

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

HOOD CANAL SAND & GRAVEL LLC DBA
THORNDYKE RESOURCE, OLYMPIC
STEWARDSHIP FOUNDATION, J. EUGENE
FARR, WAYNE AND PEGGY KING, ANNE
BARTOW, BILL ELDRIDGE, BUD AND VAL
SCHINDLER, RONALD HOLSMAN,
CITIZENS' ALLIANCE FOR PROPERTY
RIGHTS JEFFERSON COUNTY, CITIZENS'
ALLIANCE FOR PROPERTY RIGHTS LEGAL
FUND, MATS MATS BAY TRUST, JESSE A.
STEWART REVOCABLE TRUST, AND
CRAIG DURGAN,

Petitioners,

v.

JEFFERSON COUNTY AND WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Respondents.

Case No. 14-2-0008c

FINAL DECISION AND ORDER

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1 **I. SYNOPSIS**

2 *Petitioners challenge the Shoreline Master Program (SMP) adopted by Jefferson*
3 *County under Ordinance 07-1216-13 and the Department of Ecology's (Ecology) approval*
4 *of the County's SMP. The Board concludes Petitioners failed to demonstrate the decisions*
5 *of Jefferson County and Ecology violated RCW 90.58, RCW 36.70A and WAC 173-26. This*
6 *appeal is denied and Case No. 14-2-0008c is dismissed.*
7

8 **II. PROCEDURAL HISTORY**

9
10 On April 14, 15, and 18, 2014, the Board received three Petitions for Review filed by
11 Hood Canal Sand & Gravel, LLC, dba Thorndyke Resource (Hood Canal); the Olympic
12 Stewardship Foundation, J. Eugene Farr, Wayne and Peggy King, Anne Bartow, Bill
13 Eldridge, Bud and Val Schindler, and Ronald Holsman (collectively, OSF); and the Citizens'
14 Alliance for Property Rights, Jefferson County chapter, Citizens' Alliance for Property Rights
15 Legal Fund, Mats Mats Bay Trust, Jesse A. Stewart Revocable Trust, and Craig Durgan
16 (collectively, CAPR). Petitioners challenge the Shoreline Master Program (SMP) adopted
17 by Jefferson County under Ordinance 07-1216-13 and the Department of Ecology's
18 (Ecology) approval of that SMP. The Board consolidated the petitions into Case No. 14-2-
19 0008c entitled Hood Canal Sand & Gravel, LLC v. Jefferson County and Department of
20 Ecology.
21

22 On May 1, 2014, the presiding officer requested that Petitioners meet to discuss
23 rephrasing, editing, and reorganizing their issue statements prior to the Prehearing
24 Conference. Restatements of the issues were received on May 12 and 13, 2014.
25

26 A Prehearing Conference was held telephonically on May 14, 2014. On May 19,
27 2014, the parties jointly requested a 90-day extension of the case schedule for the purpose
28 of exploring settlement. The Board issued a Prehearing Order and Order Granting
29 Settlement Extension on May 23, 2014.

30 On May 30, 2014, Ecology filed a Motion to Amend Dispositive Motion Deadlines. An
31 Amended Prehearing Order, Order Granting Settlement Extension, and Order Amending
32 Dispositive Motion Deadlines was issued on June 4, 2014.

1 On June 12, 2014, Hood Canal Coalition (Intervenor) requested intervenor status.
2 No responses or objections were received and the Board granted the motion to intervene on
3 June 26, 2014. Also on June 26, 2014, the Board issued an Order Granting Motion for
4 Extension of Time to Submit Motions to Supplement the Record in response to Petitioners'
5 Request to Extend Time to Submit Motion to Supplement the Record filed June 18, 2014.

6 OSF filed a Motion for Discovery on June 27, 2014. Ecology and Jefferson County
7 responded on July 3 and 8, and OSF replied on July 14. The Board issued its Order
8 Denying Motion for Discovery and Denying Motion to File a Response to Reply on July 16,
9 2014.

10
11 On July 11, 2014, OSF filed a Motion to Supplement the Record. Respondents filed
12 a joint response to the motion on July 21, 2014, and the Board granted the motion on July
13 29, 2014. On August 8, 2014, the parties filed status reports as requested by the Board.

14 Ecology filed a Motion for Partial Summary Judgment on August 15, 2014. On
15 August 19, 2014, the Board met with the parties in Olympia, Washington to discuss
16 proposed revisions of the issue statements, the remaining case schedule and dispositive
17 motions, and other procedural matters. The parties subsequently filed a Second Request
18 for Settlement Extension on August 25, 2014, and OSF responded to the Motion for Partial
19 Summary Judgment on August 29, 2014. The Board issued a Second Amended
20 Prehearing Order, Order Granting Second Settlement Extension, and Order on Dispositive
21 Motion on September 5, 2014. A Clarification of Second Amended Prehearing Order,
22 Settlement Extension, and Order on Dispositive Motion was issued September 29, 2014, in
23 response to OSF's September 12, 2014, Motion for Clarification or in the Alternative Motion
24 for Reconsideration.
25

26
27 An Emergency Joint Motion of Petitioners to Alter Briefing Schedule was filed on
28 November 10, 2014. On November 12, 2014, the Board issued an Order Granting Motion
29 to Alter Briefing Schedule.

30 The parties subsequently filed prehearing briefs and exhibits as follows:

- 31
32
- Hood Canal Opening Brief, filed November 21, 2014;
 - CAPR Brief, filed November 21, 2014 ;

- OSF Prehearing Brief on the Merits, filed November 21, 2014;
- Errata Sheet to OSF's Prehearing Brief on the Merits, filed December 16, 2014 (OSF Errata);
- Jefferson County Prehearing Brief, filed January 5, 2015 (County's Brief);
- Ecology's Prehearing Brief, filed January 7, 2015 (Ecology's Brief); and
- Intervenor's Response Brief, filed January 7, 2015 (Intervenor's Brief);
- OSF Reply Brief, filed January 16, 2015 (OSF Reply Brief);
- CAPR's, Reply Brief filed January 16, 2015 (CAPR's Reply Brief).
- OSF filed Specifications of Exhibits Designated by OSF Petitioners, January 16, 2015.

On January 9, 2015, the presiding officer sent a letter to Dennis Reynolds (Attorney for OSF), with copies to the Parties, noting that a relatively small number of the documents attached to OSF's November 21, 2014, Prehearing Brief were cited in his brief.¹ In accordance with WAC 242-03-520 and WAC 242-03-620 the Board retained the documents submitted, but will limit the evidence in this case to those exhibits cited in the parties' briefs and attached thereto or allowed as exhibits pursuant to motions to supplement. The Board accepts OSF's Specification of Exhibits Designated to assist the Board in determining which exhibits to consider.²

The Hearing on the Merits (HOM) was convened on January 21, 2014, at the Harborside Inn in Port Townsend, Washington. Present for the hearing were Board Members Nina Carter, presiding officer, and William Roehl. Board Member Cheryl Pflug was unable to attend in person, but studied the full transcript of the proceedings along with supplementary and illustrative exhibits. Hood Canal was represented by James C. Tracy; Paul J. Hirsch appeared for CAPR; and Dennis D. Reynolds represented OSF. Jefferson County was represented by David Alvarez and Mark Johnsen, and Sonia A. Wolfman appeared for the Ecology. David Mann represented Intervenor, but selected not to present any oral argument. The hearing provided the Board an opportunity to ask questions

¹ See Appendix A to this Final Decision and Order.

² OSF, Specification of Exhibits Designated by OSF Petitioners, January 16, 2015.

1 clarifying important facts in the case and a better understanding of the parties' legal
2 arguments. At the hearing, Jefferson County provided the Board with handouts and
3 enlarged maps of their shorelines showing designations for Shorelines and Shorelines of
4 Statewide Significance (SSWS). The Board takes official notice of these materials clarifying
5 shoreline designations.³

6
7 At the Hearing on the Merits, OSF moved to supplement the record with four
8 documents. Respondents and Intervenor had no objections to materials offered by Olympic
9 Stewardship. The Board took official notice of two documents submitted by Olympic
10 Stewardship:

- 11 • Washington State's 1972 Official Voters Pamphlet;
- 12 • *The Washington Shoreline Management Act of 1971* by Geoffrey Crooks,
- 13 Washington Law Review, Volume 49 (1973-1974);
- 14

15 The Board admitted two additional documents to the record attached as Appendix D and E:

- 16 • Illustrative Exhibit #1 at HOM: Buffer Acres Plus Setback;
- 17 • Errata to Reply Brief of OSF.
- 18

19 III. BOARD JURISDICTION

20 **The Board finds** the Petitions for Review were timely filed, pursuant to RCW
21 90.58.190(2)(a) and RCW 36.70A.290(2)(c).

22 **The Board finds** the Petitioners have standing to appear before the Board, pursuant
23 to RCW 36.70A.280(2)(b). In response to Ecology's Motion for Partial Summary Judgment,⁴
24 Petitioners stated they wished to preserve their constitutional claims for further appeal and
25 thus brought the constitutional claims to the Board in order to exhaust their administrative
26 remedies.⁵

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31 ³ See attached Appendix B Shorelines Diagram distributed by the Board at the HOM and Appendix C
32 Ecology's Marine Shorelines of Statewide Significance (SSWS), Three Delineation Schemes (handout at
HOM); WA Dept. of Ecology, 2014, Jefferson County Shorelines of Statewide Significance, Figure 1;
Jefferson County Shoreline Map Folio, June 2008.

⁴ Ecology's Motion for Partial Summary Judgment (August 15, 2014) at 4-6.

⁵ Petitioners' Response to Motion for Partial Summary Judgment (August 29, 2014) at 4-6.

1 In the Board's Second Amended Prehearing Order it clarified the Board was a quasi-
2 judicial body of limited jurisdiction with no inherent or common law powers.⁶ Thus, as
3 discussed during the August 19, 2014 meeting with all parties, the Board again states it
4 lacks jurisdiction to address constitutional claims.⁷ As described in the Board's Second
5 Amended Prehearing Order, the Board lacks jurisdiction to hear constitutional issues raised
6 generally by all Petitions and specifically by Petitioner Citizens Alliance for Property Rights
7 Nos. 8.26 – 8.34 and 8.36 – 8.37. Those issues were dismissed in the Second Amended
8 Prehearing Order. In regards to CAPR Issue 8.35, although not raising a constitutional
9 claim, it asserts the violation of RCW 43.21H, a statute not within the Board's jurisdiction or
10 statutory authority. Issue 8.35 was also dismissed in the Second Amended Prehearing
11 Order.⁸

12
13 **The Board finds** it has jurisdiction over the subject matter of all remaining issues in
14 the Petitions pursuant to RCW 90.58.190(2) and RCW 36.70A.280(1)(a).
15

16 **IV. BURDEN OF PROOF AND STANDARD OF REVIEW**

17 Appeals of SMPs are governed by the Shoreline Management Act (SMA) and are
18 adjudicated by the Growth Management Hearings Board.⁹ The Board is charged with
19 adjudicating Growth Management Act (GMA) compliance and, when necessary, invalidating
20 noncompliant plans and development regulations.¹⁰ The Board also reviews shoreline
21 master programs or amendments for compliance with the requirements of the SMA,¹¹
22 Ecology's applicable guidelines,¹² the internal consistency requirements of RCW 35.63.125,
23 35A.63.105, 36.70A.040(4), and 36.70A.070, and chapter 43.21C RCW (SEPA) as it relates
24 to the adoption of master programs and amendments under chapter 90.58 RCW.¹³
25
26
27

28 ⁶ *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 565, 958 P.2d 962 (1998) (citing
29 RCW 36.70A.280(1) and .290).

30 ⁷ RCW 36.70A.280 and RCW 36.70A.300(1).

31 ⁸ Second Amended Prehearing Order, Order Granting Second Settlement Extension, and Order on Dispositive
32 Motion (September 5, 2014) at 3-4.

⁹ RCW 90.58.190(2).

¹⁰ RCW 36.70A.280 and RCW 36.70A.302.

¹¹ RCW 90.58.190(2).

¹² RCW 98.58.200, 98.58.060, and WAC 173-26-171 through WAC 173-26-251.

¹³ RCW 90.58.190(2)(b) and (c).

1 The appellant has the burden of proof in an appeal of an SMP.¹⁴ RCW 90.58.190(2)
2 addresses the scope of review and the burden of proof in an appeal of a shoreline master
3 program. It also distinguishes the different review standards for “Shorelines” and
4 “Shorelines of Statewide Significance.”

5 **RCW 90.58.190**

6 (2)(a) The department's decision to approve, reject, or modify a proposed
7 master program or amendment adopted by a local government planning
8 under RCW 36.70A.040 shall be appealed to the growth management
9 hearings board with jurisdiction over the local government. The appeal shall
10 be initiated by filing a petition as provided in RCW 36.70A.250 through
36.70A.320.

11 (b) If the appeal to the growth management hearings board concerns
12 **shorelines**, the growth management hearings board shall review the
13 proposed master program or amendment **solely for compliance with the**
14 **requirements of this chapter, the policy of RCW 90.58.020 and the**
15 **applicable guidelines, the internal consistency provisions of RCW**
16 **36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter**
17 **43.21C RCW** as it relates to the adoption of master programs and
18 amendments under chapter 90.58 RCW.

19 (c) If the appeal to the growth management hearings board concerns a
20 **shoreline of statewide significance**, the board shall uphold the decision by
21 the department unless the board, by **clear and convincing evidence**,
22 determines that the decision of the department is inconsistent with the **policy**
23 **of RCW 90.58.020 and the applicable guidelines.**

24 (d) **The appellant has the burden of proof** in all appeals to the growth
25 management hearings board under this subsection.

26 (e) Any party aggrieved by a final decision of a growth management
27 hearings board under this subsection may appeal the decision.
28 (emphasis added)

29 Thus, the burden is on the Petitioners to prove that Ecology’s decision to approve
30 Jefferson County’s SMP is inconsistent with the requirements of the SMA, Ecology’s
31 shoreline master program guidelines, the internal consistency requirements, and SEPA as
32 it relates to the adoption of master programs and amendments under chapter 90.58 RCW.¹⁵

**For this case, the Board examined the County’s SMP under both scopes of
review and applicable burdens of proof because Jefferson County’s shorelines are**

¹⁴ RCW 90.58.190(2)(d).

¹⁵ RCW 90.58.190(2)(b) and (c).

1 comprised of both SSWS as well as “Shorelines” as defined in RCW 90.58.190(2)(b)
2 and (c). Respondents requested the Board only apply the higher standard for SSWS to the
3 County’s Shoreline Master Plan, but from County maps provided at the Hearing on the
4 Merits and the ensuing discussion by the parties and the Board, it is clear Jefferson
5 County’s shorelines consist of both SSWS and shorelines. At the HOM, the Board
6 augmented the County’s maps with an illustrative drawing to facilitate discussion of the
7 applicable standard and scope of the Board’s review.¹⁶

8
9 As stated above, the Board has jurisdiction to review proposed shoreline master
10 programs for compliance with the “applicable guidelines.” The parties disagree as to
11 which guidelines are “applicable.” The Board is directed to review SMA challenges
12 related to “shorelines”:

13 . . . solely for compliance with the requirements of this chapter, the policy of
14 RCW 90.58.020 and **the applicable guidelines**, the internal consistency
15 provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105,
16 and chapter 43.21C RCW as it relates to the adoption of master programs
17 and amendments under chapter 90.58 RCW.¹⁷

18 and RCW 90.58.190(2)(c) as applied to “shorelines of statewide significance”:

19 . . . the board shall uphold the decision by the department unless the board,
20 by clear and convincing evidence, determines that the decision of the
21 department is inconsistent with the policy of RCW 90.58.020 and **the**
22 **applicable guidelines**.¹⁸

23 Petitioners argue the applicable guidelines are **all** of chapter 173-26 WAC while
24 Respondents contend the guidelines are only those set forth in Part III, entitled
25 “Guidelines” at WAC 173-26-171 through and including WAC 173-26-251.
26

27
28 ¹⁶ See Appendix B and C.

29 ¹⁷ RCW 90.58.190(b): “If the appeal to the growth management hearings board concerns shorelines, the
30 growth management hearings board shall review the proposed master program or amendment **solely for**
31 **compliance with the requirements of this chapter, the policy of RCW 90.58.020 and the applicable**
32 **guidelines, the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and**
35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and
amendments under chapter 90.58 RCW.”

¹⁸ RCW 90.58.190(2)(c): “If the appeal to the growth management hearings board concerns a **shoreline of**
statewide significance, the board shall uphold the decision by the department unless the board, by **clear and**
convincing evidence, determines that the decision of the department is inconsistent with the **policy of RCW**
90.58.020 and the applicable guidelines.”

1 RCW 90.58.060(1) directed the Department to adopt guidelines. The most recent
2 complete iteration of those guidelines became effective on January 17, 2004. Chapter
3 173-26 WAC includes four Parts and as stated in WAC 173-26-010:

4 In order to facilitate this process, Part I of this chapter [chapter 173-26 WAC]
5 establishes a recordkeeping system for the department and defines the
6 contents of the state master program. Part II sets forth procedures for
7 approving and adopting master programs and amendments thereto. Part III
8 comprises the guidelines pursuant to RCW 90.58.060 and provides
9 **guidance for developing the content of shoreline master programs**. Part
10 IV - addresses the requirements of the state Ocean Resources Management
11 Act. (emphasis added)

11 "Guidelines" are defined by WAC 173-26-020(21) to mean:

12 . . . those standards adopted by the department to implement the policy of
13 chapter 90.58 RCW for regulation of use of the shorelines of the state prior to
14 adoption of master programs. Such standards shall also **provide criteria for**
15 **local governments** and the department in developing and amending master
16 programs. (emphasis added)

17 Part III's first section is WAC 173-26-171 and states in part:

18 (1) Authority. RCW 90.58.090 authorizes and directs the department to adopt
19 "guidelines consistent with RCW 90.58.020, containing the elements
20 specified in RCW 90.58.100" for development of local master programs for
21 regulation of the uses of "shorelines" and "shorelines of statewide
22 significance" . . .

22 (2) Purpose. . . . In keeping with the relationship between state and local
23 governments prescribed by the act, the guidelines have three specific
24 purposes: To assist local governments in developing master programs; to
25 serve as standards for the regulation of shoreline development in the
26 absence of a master program along with the policy and provisions of the act
27 and, to be used along with the policy of RCW 90.58.020, as criteria for state
28 review of local master programs under RCW 90.58.090.

27 (3) Effect.

28 (a) The guidelines are guiding parameters, standards, and review criteria for
29 local master programs. The guidelines allow local governments substantial
30 discretion to adopt master programs reflecting local circumstances and other
31 local regulatory and nonregulatory programs related to the policy goals of
32 shoreline management as provided in the policy statements of RCW
90.58.020, WAC 173-26-176 and 173-26-181. The policy of RCW 90.58.020
and these guidelines constitute standards and criteria to be used by the
department in reviewing the adoption and amendment of local master

1 programs under RCW 90.58.090 **and by the growth management**
2 **hearings board** and shorelines hearings board adjudicating appeals of
3 department decisions to approve, reject, or modify proposed master
4 programs and amendments under RCW 90.58.190. (emphasis added)

5 Beyond that, WAC 173-26-201(1)(a) incorporates “**the minimum procedural rule**
6 **requirements of WAC 173-26-010 through 173-26-160” included in Parts I and II.**

7 Consequently, the Board determines neither the Petitioners’ nor the
8 Respondents’ positions are completely accurate. The Board concludes the “applicable
9 guidelines” referenced in RCW 90.58.190(2)(b) and (c), the statutes which set forth the
10 scope of the Board’s review jurisdiction for SMP challenges, are included in Part III of
11 chapter 173-26 WAC, but the Board’s scope of review also includes “the minimum
12 procedural rule requirements of WAC 173-26-010 through 173-26-160” due to the
13 **referenced incorporation.** Any violation allegations not included within those
14 parameters are beyond the Board’s jurisdictional purview.
15

16 17 **V. PRELIMINARY MATTERS**

18 **The Record**

19 RCW 36.70A.290(4) requires the Board to make its decision on the record developed
20 by Jefferson County and Ecology. In this matter, two records were developed, one by
21 Jefferson County and a second by Ecology. Jefferson County’s Index of Record¹⁹ consists
22 of 139 pages referencing hundreds of documents. Ecology’s Index of Record is even more
23 extensive, consisting of over 700 pages, and listing items which total many thousands of
24 pages.²⁰ The record indices list all material used by Jefferson County and Ecology in
25 adopting the Ordinance challenged herein. In this matter, petitioner OSF submitted 354
26 exhibits with its prehearing brief, consisting of thousands of pages. However, only a limited
27 number of those exhibits were cited in OSF’s brief.²¹
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29

30
31 ¹⁹ WAC 242-03-510 requires a respondent to file with the Board an index listing all material used in taking the
32 action which is the subject of the petition for review, the Index of Record. The Index of Record is just that; it is
not the actual documents.

²⁰ Both indices of the record were filed on May 30, 2014.

²¹ As stated by counsel for OSF in correspondence dated January 13, 2015, he was “. . . obligated to
designate exhibits for later review for those issues outside of Board jurisdiction.”

1 While RCW 36.70A.290(4) requires the Board to base its decision on the record
2 developed by the County and the state agency, typically some, if not most, of the
3 documents from a jurisdiction's record are not relevant to issues raised in a petition for
4 review.²² Consequently, the rules clarify that evidence which a party wishes the Board to
5 consider must be submitted to the Board (and other parties) with their Hearing on the Merits
6 briefs (WAC 242-03-620) and that the evidence in the case consists solely of the exhibits
7 attached to and cited in the briefs (WAC 242-03-520).²³ Based on RCW 36.70A.290(4) and
8 the Board's rules, WAC 242-03-520 and WAC 242-03-620, the Board's decision has been
9 constructed solely on evidence from the record which was cited in and submitted to the
10 Board with the briefs of the parties. In regards to OSF's prehearing and reply briefs, the
11 Board relies on the exhibits specified by OSF in their January 16, 2015 Specification Of
12 Exhibits Designated.²⁴

13 Abandoned Issues

14 The Board's Rules of Practice and Procedure provide:

15 WAC 242-03-590

16 **Briefs.**

17 (1) A petitioner ... shall submit a brief addressing each legal issue it expects
18 the board to determine. **Failure by such a party to brief an issue shall**
19 **constitute abandonment of the unbrieffed issue.** Briefs shall enumerate
20 and set forth the legal issue(s) as specified in the prehearing order.
21 (emphasis added)

22 The Board's September 5, 2014 Second Amended Prehearing Order states clearly,
23 "Pursuant to WAC 242-03-590(1), failure of a party to brief an issue in the opening brief is
24 deemed abandonment of that issue."²⁵ Further, the Board has held "[a]n issue is briefed
25 when legal argument is provided; **it is not sufficient for a petitioner to make conclusory**
26

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32 ²² WAC 242-03-210(2)(c) requires that a Petition for Review include a detailed statement of the issues presented for resolution by the Board specifying the provisions of the act allegedly violated.

²³ OSF's counsel acknowledges that fact in his correspondence of January 13, 2015.

²⁴ Specification of Exhibits Designated by Petitioner, Olympic Stewardship Foundation, January 16, 2015.

²⁵ Second Prehearing Order, September 5, 2014 at 8.

1 **statements, without explaining how, as the law applies to the facts before the Board,**
2 **a local government has failed to comply with the Act.**²⁶ In this case, Petitioners'
3 Prehearing Briefs often make conclusory statements or do not reference, with legal
4 argument, specific statutes they allege have been violated. In those issues statements
5 where Petitioners have not provided specific legal argument for citations listed in their issue
6 statements, and specify which provisions of the law they claim are violated, the Board will
7 deem those citations abandoned. The alleged violation will not be considered. Thus, the
8 Board deems the following abandoned:²⁷

10 **OSF's General Issue 1:** Violations of the following statutes alleged in OSF General
11 Issue 1 but were not supported by argument in the Petitioners' prehearing brief and are
12 deemed **abandoned**.

- 13 • RCW 90.58.080
- 14 • RCW 90.58.100
- 15 • RCW 90.58.620
- 16 • WAC 173-26-211

18 **OSF General Issue 2:** Violations of the following statutes alleged in OSF General
19 Issue 2 but were not supported by argument in the Petitioners' prehearing brief and are
20 deemed **abandoned**.

- 21 • RCW 90.58.050
- 22 • RCW 90.58.065
- 23 • RCW 90.58.090
- 24 • RCW 90.58.100(6)
- 25 • RCW 90.58.130
- 26 • RCW 90.58.250
- 27 • RCW 90.58.270
- 28 • RCW 90.58.340

29 ²⁶ *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and
30 Order, (Jan. 8, 1997), at 7. See also *City of Bremerton v. Kitsap County*, CPSGMHB Consolidated Case No.
04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5.

31 ²⁷ See *North Clover Creek v. Pierce County*, GMHB Case No. 10-3-0015: An issue was abandoned when
32 other than repeating these statutes in the statement of Legal Issue 3 petitioners have made no argument tied
to these provisions. WAC 242-02-570(1) provides in part "Failure to brief an issue shall constitute
abandonment of the unbrieffed issue." An issue is briefed when legal argument is provided. It is not enough to
simply cite the statutory provision in the statement of the legal issue. Final Decision and Order (May 18, 2011)
at 11.

- RCW 36.70A.480
- WAC 173-26-176
- WAC 173-26-221
- WAC 173-26-191

OSF General Issue 3: Violations of the following statutes were alleged in OSF General Issue 3 but were not supported by argument in the Petitioners' prehearing brief and are deemed **abandoned**.

- RCW 90.58.020
- RCW 90.58.100
- WAC 173-26-090
- WAC 173-26-192(sic)
- WAC 173-26-231
- WAC 173-26-241
- WAC 173-26-251

OSF General Issue 6: Violations of the following statutes were alleged in OSF General Issue 6 but were not supported by argument in the Petitioners' prehearing brief and are deemed **abandoned**.

- WAC 173-26-191

OSF General Issue 8: Violations of the following statutes were alleged in OSF General Issue 8 but were not supported by argument in the Petitioners' prehearing brief and are deemed **abandoned**.

- RCW 90.58.020
- RCW 90.58.030
- RCW 90.58.065
- RCW 90.58.090
- RCW 90.58.100(6)
- RCW 90.58.130
- RCW 90.58.250
- RCW 90.58.270
- RCW 90.58.340
- RCW 90.58.620
- RCW 90.58.710
- WAC Chapter 173-26

CAPR Issue 4: Violations of the following statutes were alleged in Issue 4 but were not supported by argument in the Petitioners' prehearing brief and are deemed **abandoned**.

- WAC 173-26-211
- WAC 173-26-221(2)
- WAC 173-26-231(2)
- WAC 173-26-251(3)

Hood Canal Sand and Gravel Issue 3: Violation of the following statute was alleged in Issue 3 but was not supported by argument in the Petitioners' prehearing brief and is deemed **abandoned**.

- WAC 173-27-186

VI. LEGAL ISSUES AND ANALYSIS

A. Olympic Stewardship Foundation

General Issue No. 1

Whether Respondents have met their burden to justify adoption of a new SMP? (Discussing OSF Issue Nos. 1 and 10 in Second Amended Prehearing Order)

1. Did the new Jefferson County Shoreline Master Program ("SMP") promulgated by Ordinance No. 07-1216-3 fail to comply with RCW 90.58.020, .080(1), .100(1), .620 and WAC 173-26-191, -201, -211 because it is unsupported by new scientific studies or evidence of adverse effects constituting major or significant changed circumstances, allegedly resulting from current development regulations in Jefferson County?
10. Whether Ecology and the County violated mandated processes for approval of a new SMP including but not limited to (a) the quality and timing of its Final Cumulative Impact Assessment and Shoreline Inventory and (b) the requirement to foster meaningful comment and reasonably consider public comment?

1 **Applicable Laws**²⁸

- 2 • RCW 90.58.020
3 • WAC 173-26-186²⁹
4 • WAC 173-26-191
5 • WAC 173-26-201

6 **Position of the Parties**

7 *Petitioners*

8 OSF charges that RCW 90.58.020 requiring coordinated planning was violated
9 because Respondents adopted the SMP in isolation of other planning or regulatory
10 processes and did not coordinate SMP amendments with other existing processes.³⁰ Citing
11 WAC 173-26-201(2)(c), OSF argues the County merely has an obligation to achieve No Net
12 Loss (NNL) of shoreline ecological functions. Further, OSF maintains that pursuant to WAC
13 173-26-201(3)(d) the County must analyze data gathered for Jefferson County's Final
14 Shoreline Inventory and Characterization Report (SI),³¹ but while the County prepared the
15 Report, it only **described** the shoreline data rather than **analyzed** the "causes and effects"
16 between ecological stressors and development impacts.³² Without this analysis, OSF
17 claims the County violated WAC 173-26-201(3)(d). Further, OSF claims data in the Report
18 were not field tested along the County's shoreline.³³
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24 ²⁸ For lack of legal argument, the following are considered abandoned: RCW 90.58.080; RCW 90.58.100;
25 RCW 90.58.620; WAC 173-26-211. See *North Clover Creek v. Pierce County*, GMHB Case No. 10-3-0015:
26 An issue was abandoned when other than repeating these statutes in the statement of Legal Issue 3,
27 petitioners have made no argument tied to these provisions. WAC 242-02-570(1) provides in part "Failure to
28 brief an issue shall constitute abandonment of the unbrieffed issue." An issue is briefed when legal argument
29 is provided. It is not enough to simply cite the statutory provision in the statement of the legal issue. Final
30 Decision and Order (May 18, 2011), at 11.

31 ²⁹ Although WAC 173-26-186 was not listed in OSF Issue 1 statement, it is cross-referenced in WAC 173-26-
201(2)(c). The Board accepts review of WAC 173-26-186 in Issue 1.

32 ³⁰ OSF Prehearing Brief at 11.

33 ³¹ OSF Ex. 124 and ECY003927. *Jefferson County Final Shoreline Inventory and Characterization Report (SI)*
– *Revised November 2008* See reference in OSF Prehearing Brief(November 21, 2014) at 8.

³² WAC 173-26-201(3)(d) "Analyze shoreline issues of concern. Before establishing specific master program
provisions, local governments shall analyze the information gathered in (c) of this subsection and as
necessary to ensure effective shoreline management provisions, address the topics below, where applicable."

³³ *Id.* at 8-10 for reference to lack of data; reference to cause and effect is on 13; reference to field verification
is on 10.

1 Likewise, OSF maintains the Cumulative Impact Analysis (CIA)³⁴ failed to assess the
2 “benefits provided by then-existing regulations and project mitigation imposed under the
3 SMA permitting and State Environmental Policy Act (SEPA) authority.” OSF argues WAC
4 173-26-186(8)(d)(iii) describes information necessary for a CIA, but the County did not apply
5 the requirements from WAC 173-26-186(8)(d)(iii).³⁵ OSF concludes “there was no
6 documentation of harm, thus demonstrating that the existing regulatory systems were doing
7 the job.”³⁶ OSF gives examples of how homes and docks could be built under current
8 regulations and using the prior SMP, while still protecting the shoreline. OSF concludes the
9 County’s lack of analysis of existing regulatory systems is in violation of WAC 173-26-
10 186(8)(a)³⁷ for marine environments and WAC 173-26-186(d)(iii) for established regulatory
11 programs.³⁸

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13 Finally, OSF reads WAC 173-26-191(2)(a)(ii)(B)³⁹ and WAC 173-26-201(2)(b) to
14 require periodic evaluation and monitoring of cumulative environmental effects of projects in
15 relation to changes in SMP policies.⁴⁰ OSF alleges Jefferson County is without a
16 mechanism to monitor NNL as a result of implementing the new SMP and cites an SMA
17 Guideline on monitoring: “Local governments should monitor actions taken to implement
18 their master program and shoreline conditions.”⁴¹
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25 ³⁴ OFS Ex. 350 and ECY 000082. Jefferson County -- Shoreline Master Program Update -- *Cumulative*
26 *Impacts Analysis* (CIA) (February 2010) and referenced in OSF Brief at 10-11.

27 ³⁵ OSF Brief at 10-11 and see also WAC 173-26-186(8)(d)(iii): “Local master programs shall evaluate and
28 consider cumulative impacts. . . To ensure no net loss of ecological functions and protection of other shoreline
29 functions and/or uses, master programs shall contain policies, programs, and regulations that address adverse
cumulative impacts and fairly allocate the burden of addressing cumulative impacts among development
opportunities. Evaluation of such cumulative impacts **should consider: (iii) Beneficial effects of any**
30 **established regulatory programs under other local, state, and federal laws.**”

31 ³⁶ OSF Brief at 11.

32 ³⁷ *Id.* at 12.

³⁸ *Id.* at 10.

³⁹ WAC 173-26-191(2)(a)(ii): “Master program regulations. . . (B) Include environment designation regulations
that apply to specific environments consistent with WAC 173-26-210.”

⁴⁰ OFS Prehearing Brief (November 21, 2014) at 14; see also WAC 173-26-191(2)(a)(ii)(B): “Include
environment designation regulations that apply to specific environments consistent with WAC 173-26-210.”

⁴¹ *Id.* at 14-15.

1 *Respondents*

2 The County responds that RCW 90.58.080(2)(a)(iii) required Jefferson County to
3 update its SMP to meet new Ecology guidelines. The County states OSF “conflates the
4 criteria which must be met . . . to periodically amend its SMP” with the legislative update
5 mandate.⁴² The County asserts it is not required to prove its shorelines had or had not been
6 degraded, nor how existing regulations could substitute for an updated SMP. Rather, it was
7 satisfactory for the County to “recognize the scientific literature identifying the risks to
8 shorelines posed by inappropriate use and development, and to take reasonable measures
9 to avoid harmful impacts, in compliance with RCW 90.58 and WAC 173-26.”⁴³ The County
10 relied on “abundant” scientific information to document risks to their shorelines; for example,
11 one risk is habitat depletion for endangered species and the need to preserve undeveloped
12 shorelines for those species.⁴⁴ The County refers to over 600 scientific reports in its
13 bibliography of scientific and technical information as sources of data about the ecological
14 state of their shorelines.⁴⁵

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17 The County also points out there are no requirements, in either case law or the SMA,
18 that each shoreline parcel be walked and field tested. Instead, the County relied on
19 accurate aerial photography and GIS technology which “have evolved to the point where
20 they can provide an accurate characterization of shorelines and uses thereon.”⁴⁶

21 Finally, in regards to monitoring requirements, the County stated at the Hearing on
22 the Merits that WAC 173-26 Guidelines for SMP updates do not specifically require
23 monitoring of the shoreline, but the County will monitor shoreline development as permits
24 are issued.⁴⁷

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31 ⁴² Jefferson County Brief (January 6, 2015) at 9.

32 ⁴³ *Id.* at 10.

⁴⁴ *Id.* at 11 and 12.

⁴⁵ *Id.* at 11 and ECY 008189 Jefferson County Ordinance # 07-1216-13, Jefferson County SMP Update, Ex. B
Bibliography of Scientific and Technical Information Considered.

⁴⁶ Respondent Jefferson County’s Prehearing Brief at 13.

⁴⁷ Transcript from Hearing on the Merits, January 21, 2015 at 99-101.

Ecology concurs with Jefferson County's analysis and states many of OSF's issues should be dismissed because OSF only cites WAC 173-26-201 and makes a passing reference to RCW 90.58.020.⁴⁸

Board Discussion, Analysis, and Conclusion

Statutory and administrative code violations cited in OSF's General Issue 1 which were not argued are deemed abandoned.⁴⁹ OSF's remaining arguments claim the SMP violates RCW 90.58.020, WAC 173-26-186, WAC 173-26-191, and WAC 173-26-201. OSF presents claims about WAC 173-26-186 even though it was not specifically listed in Issue 1 however it is cross-referenced in WAC 173-26-201.⁵⁰ Thus, the Board considers OSF's argument on WAC 173-26-186.

Jefferson County's prior SMP was adopted in 1974, and amended most recently in 1998.⁵¹ The County adopted its comprehensive plan in 1998 and amended it in 2004.⁵² Since the County's adoption of its most recent amendment, Jefferson County has adopted a critical areas ordinance (2008) pursuant to the GMA.⁵³ GMA requirements necessitating careful review include the need to ensure consistency between a jurisdiction's comprehensive plan policies.⁵⁴ SMA policies are considered to be comprehensive plan policies.⁵⁵ Consequently, the Board's analysis of OSF's alleged violations will be considered in light of the fact Jefferson County needed to update its SMP to insure it complied with both the requirements of the SMA and Ecology's Guidelines. Importantly, Jefferson County does not need to "justify adoption of a new SMP" as OSF's Issue No. 1 alleges. The question the Board must address is whether, in adopting the required SMP, the County failed to comply with RCW 90.58.020, and WAC 173-26-186, -191 and -201.

⁴⁸ Ecology Brief at 15.

⁴⁹ The following are abandoned: RCW 90.58.080; RCW 90.58.100; RCW 90.58; WAC 173-26-191; WAC 173-26-211.

⁵⁰ OSF Prehearing Brief at 10 and 12.

⁵¹ Resolution No. 77-09. p. 4, ¶¶ 5 & 6, ECY 000233.

⁵² Resolution No. 77-09. p. 4, ¶ 10, ECY 000233.

⁵³ Resolution No. 77-09. p. 4, ¶ 13, ECY 000233.

⁵⁴ RCW 36.70A.070.

⁵⁵ RCW 36.70A.480(1).

1 Regarding RCW 90.58.020, OSF makes a brief comment about the County's lack of
2 coordination with other planning processes such as the GMA or watershed planning. OSF
3 makes conclusory statements, but provides no argument explaining how the County
4 violated RCW 90.58.020. The Board notes that the Ordinance,⁵⁶ the SI,⁵⁷ and CIA⁵⁸ contain
5 evidence of coordination and cross-referencing between the SMP, GMA, and other planning
6 and regulatory processes. **The Board finds** OSF failed to prove the County did not comply
7 with RCW 90.58.020.
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9 Regarding WAC 173-26-201(3)(d), OSF claims the County failed to collect and
10 analyze information pertaining to existing development and existing conditions or
11 regulations which could affect shorelines."⁵⁹ OSF argues the SI has the "deceptive title
12 *Reach Inventory and Analyses* (emphasis in original) [and there is] characterization to an
13 extent, but no analysis of cause-and effect."⁶⁰ These allegations are made in tandem with
14 OSF's suggestion that the County was not required to update its SMP as "there was no
15 documentation of harm," "buffers were unnecessary," and "vegetation and trees were
16 already protected by steep slopes or eagle protection regulations."⁶¹ OSF asks the Board to
17 determine whether the County met WAC 173-26-201(3) requirements to sufficiently analyze
18 existing conditions showing cause and effect of shoreline development and its impact on
19 ecological functions.⁶²
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21 The Board determines that neither the SMA nor the Guidelines require an analysis of
22 how an existing regulatory scheme would protect shorelines as compared to an amended
23 SMP. Claiming this analysis was required harkens back to OSF's reference to the
24 underlying "base inquiry" of whether "it was 'necessary' for the County to adopt a new SMP
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28 ⁵⁶ ECY 008189 Jefferson County Ordinance # 07-1216-13, Jefferson County SMP Update at 1, 4, 5, 30, 33,
29 40, 46, 47.

30 ⁵⁷ OSF Ex. 124 and ECY003927. *Jefferson County Final Shoreline Inventory and Characterization Report* (SI)
31 – Revised November 2008 at Ch. 1 at 1-4, Ch. 4 at 4-1 and 4-2.

32 ⁵⁸ OFS Ex. 350 and ECY 000082. Jefferson County -- Shoreline Master Program Update -- *Cumulative
Impacts Analysis* (CIA) (February 2010) at 1, 3, 38, 56, 57, 59, 60, 62, 64, 66, 68.

⁵⁹ OSF Prehearing Brief at 8.

⁶⁰ *Id.* at 9.

⁶¹ *Id.*, at 11.

⁶² *Id.* at 9.

1 in lieu of making discrete amendments to the original SMP.”⁶³ RCW 90.50.080 required the
2 County to update its SMP to comply with Ecology’s SMP Guidelines.

3 The “analysis” standard to which the County is being held is found in WAC 173-26-
4 201(3)(c) requiring an inventory of shoreline conditions by gathering “all pertinent and
5 available information, existing inventory data and materials.” Once the County collects the
6 information, it is required to:

7
8 (d) **Analyze shoreline issues of concern.** Before establishing specific
9 master program provisions, local governments shall analyze the information
10 gathered in (c) of this subsection and as necessary to ensure effective
11 shoreline management provisions, address the topics below, where
applicable.

12 When analyzing “issues of concern,” a jurisdiction must begin with characterizing
13 eco-system functions, estimate future demands for shoreline space, and analyze cumulative
14 impacts of SMP policies pursuant to WAC 173-26-201(3)(d). Subsection (d) does not
15 require, as OSF claims, an analysis of “various shoreline studies with intent to correlate the
16 ‘cause-and-effects’ scientific link between the ecological stressors and the degree of
17 development impacts.”⁶⁴ Instead, the Board determines that the County completed the
18 steps to amend their SMP as required in WAC 173-26-201(3).
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20 Specifically, the Board found the County completed requirements in WAC 173-26-
21 201(3)(c) to “inventory shoreline conditions” and in WAC 173-26-201(3)(d) to “analyze
22 shoreline issues of concern.” The Board found the SI⁶⁵ and the CIA⁶⁶ to be comprehensive
23 and informative in addressing these WAC requirements. In reviewing the County’s SI and
24 CIA, the Board finds the County completed the following steps which were also documented
25 in Ordinance # 07-1216-13:⁶⁷
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30 ⁶³ *Id.* at 3.

31 ⁶⁴ OSF Brief at 8-9 and 13.

32 ⁶⁵ OSF Ex. 124 or ECY 003927 and also Jefferson County Ordinance # 07-1216-13 Ex. E to Locally Approved
SMP, *Jefferson County Final Shoreline Inventory and Characterization Report (SI)* (Revised November 2008)
at Ch. 1, 2, 3, and 4.

⁶⁶ OSF Ex. 350 or ECY 000082 *Jefferson County --Shoreline Master Program Update --Cumulative Impacts
Analysis(CIA)*(February 2010).

⁶⁷ ECY 008189 Jefferson County Ordinance # 07-1216-13.

- Procured professional services from a qualified consulting firm and a science laboratory, established two citizen/stakeholder groups as a technical and policy advisory committees, and compiled and reviewed “the most current, accurate and complete scientific and technical information available” per WAC 173-26-201(2)(a).⁶⁸
- Hosted numerous public meetings to verify and assess the work of staff and advisory committees.⁶⁹ In accordance with WAC 173-26-201(2)(a) and (3)(a-f), the County prepared an SI, a restoration plan, CIA to assess the collective effects of the SMP.⁷⁰
- Described limitations of the inventory including limitations to field verification,⁷¹ the scope of its inventory,⁷² and the limits of evaluating all shoreline policies and regulations.⁷³
- Assessed shorelines for impaired shoreline functions and the value of shorelines and created a tool by which policy makers could determine future uses.
- Inventoried each Water Resource Inventory Area (WRIA) to “build on the watershed overviews in Chapter 3 and describe conditions directly adjacent to individual shoreline segments (or reaches).” Specifically, in accordance with

⁶⁸ *Id.* at 7 and references to advisory committees are throughout the Ordinance.

⁶⁹ *Id.* at 2, 13, 15-17.

⁷⁰ *Id.* at 19-20.

⁷¹ *Jefferson County Final Shoreline Inventory and Characterization Report* (Revised November 2008) at 1-2 “Although the scope of this effort did not include field verification of shoreline conditions, considerable effort was put forth to ensure that the information presented is complete and accurate as of the date of publication. This included soliciting information from numerous reliable sources and requesting peer review from local, state, and federal agency representatives, tribes, and non-governmental organizations with knowledge of the local shoreline conditions.”

⁷² *Id.* at 1-2. “It also characterizes, in a general manner, the ecosystem processes that shape and influence conditions along each reach of the County’s shoreline. A goal of the watershed or landscape-scale analysis is to determine which of the key shoreline-influencing processes have been altered or impaired, even if the factors contributing to the impairment occur outside or beyond the jurisdiction of the SMA.”

⁷³ *Id.* at 1-2 and 1-3. “Finally, this report is not intended as a full evaluation of the effectiveness of the SMA or County’s existing shoreline policies or regulations. Alterations and impairments described in this report could be the result of actions that occurred prior to the adoption of the SMP, actions that are exempt from SMP regulation as dictated by the Act, illegal actions, and/or actions that occurred outside shoreline jurisdiction. That said, the inventory and characterization information can serve as a valuable tool for determining how future use and development might affect shoreline resources, where there are opportunities to restore or rectify past impacts, and where there are valuable or unaltered areas that need protection.”

WAC 173-26-201(3)(c), Chapter 4 analyzes existing physical characteristics of every “reach” including land use patterns, transportation, utilities, impervious surfaces, vegetation, critical areas, degraded areas, channel migration zones, and archeological resources.

- Analyzed its shorelines, reach by reach, to understand ecological systems.⁷⁴ Section 3.3.2 described causes and examples of changes to its shorelines, such as nutrient loading,⁷⁵ landslides,⁷⁶ climate change, and their effects on shorelines.⁷⁷
- Reviewed conditions and regulations in shorelands and adjacent areas that affect shorelines, such as surface water management and land use regulations.⁷⁸
- Recommended environmental designations for uses along the shorelines.⁷⁹

⁷⁴ *Id.* at 3-1. “This chapter describes the ecosystem-wide processes that influence and shape shoreline functions, in accordance with WAC 173-26-210(3)(d). Information is presented at a coarse scale and provides a basis for understanding shoreline management in the context of the broader landscape. Details on individual shoreline reaches are provided in Chapter 4.”

⁷⁵ *Id.* at 3-30. “Nutrient loads from streams and rivers entering the nearshore are affected by the magnitude of river discharge, as well as watershed land uses. Major human sources of nutrients from upland areas include agricultural operations (animal manure, fertilizers), wastewater treatment plants, and stormwater runoff from residential landscapes (Embrey and Inkpen, 1998 as cited in Fagergren, 2004). Major anthropogenic sources of nutrients in Hood Canal include human sewage, stormwater runoff, chum salmon carcasses from hatchery returns, agricultural waste, and forestry (Fagergren et al., 2004).”

⁷⁶ *Id.* at 3-34. “The erosion of glacial and non-glacial sedimentary deposits has created high-elevation, often unstable bluffs along the shores of much of eastern Jefferson County. According to Ecology’s recently digitized slope stability mapping (based on the 1970s Coastal Zone Atlas), 83 historic landslides were identified in the Jefferson County study area. Recent landslides were mapped at 327 locations.”

⁷⁷ *Id.* at 3-37. “The Intergovernmental Panel on Climate Change predicts that between 1990 and 2100, average global surface temperature could increase from 2.5 to 10.4°F, and global sea level could rise between 4 and 35 inches, depending on both the rate of natural changes and the response of the climate system to greenhouse gas emissions now and in the future (IPCC, 2006 as cited in King County, 2006). Increasing temperatures and sea levels are likely to impact shorelines of Jefferson County in multiple ways, as described below.” *Id.* at 3-38. “Projected average flows in the Quinault River after 2040, for example, are 4,000 to 5,000 cubic feet per second (cfs) higher in December than current average flows, while average flows in June after 2040 may be 3,000 to 4,000 cfs lower than current average flows. Moderate floods are also expected to increase in basins dominated by transient snow zones, though large floods are expected to occur at approximately the same frequency as they do today (Casola et al., 2005a).”

⁷⁸ *Id.* at 4-1. Chapter 4.0 Reach and Inventory Analysis *Jefferson County Final Shoreline Inventory and Characterization Report* (Revised November 2008) The Board notes that every reach within the County’s Water Resource Inventory Area (WRIA #16) contains information about Nearshore Reaches, Biological Resources, Land Use and Zoning (the land use regulations for the reach), Shoreline Modifications, Public Access, and Restoration Opportunities.

⁷⁹ OSF Ex. 124 and ECY003927. *Jefferson County Final Shoreline Inventory and Characterization Report* (SI) – Revised November 2008 at Ch. 5.

1 The Board determined the County completed all steps required in WAC 173-26-
2 201(3)(c) and (d), but the Board also reviewed these WACs to determine if OSF's claim that
3 a cause and effect analysis of existing regulations on current or future shoreline
4 development must be completed. The Board found no such requirement. Rather, it found
5 WAC 173-26-201(3)(c) and (d) mandated some actions,⁸⁰ but the Guidelines are also
6 permissive and allow flexibility as a jurisdiction develops an SMP.⁸¹ The County's SI and
7 CIA demonstrate the County prepared amendments to the SMP in accordance with WAC
8 173-26-201(3)(c) and (d) by having the public participate in the SMP process, by
9 inventorying their shorelines and by analyzing shoreline issues of concern. Further, the
10 County's CIA identified, inventoried, and documented "current and potential ecological
11 functions provided by affected shorelines" and proposed policies and regulations to achieve
12 no net loss of those functions as required in WAC 173-26-186(8).⁸² **The Board finds OSF**
13 **failed to prove the County did not comply with WAC 173-26-201, and by reference, WAC**
14 **173-26-186.**
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19 ⁸⁰ WAC 173-26-201(3)(c). "Inventory shoreline conditions. Local governments **shall be prepared** to
20 demonstrate how the inventory information was used in preparing their local master program amendments. . .
21 Local government shall, at a minimum, and to the extent such information is relevant and reasonably available,
22 collect the following information."

23 WAC 173-26-201(3)(d). "Analyze shoreline issues of concern. Before establishing specific master program
24 provisions, local governments **shall analyze** the information gathered in (c) of this subsection and as
25 necessary to ensure effective shoreline management provisions, address the topics below, where applicable."
26 (emphasis added)

27 ⁸¹WAC 173-26-201(3)(c). "Ensure that, **whenever possible**, inventory methods and protocols are consistent .
28 . . ." "Local government shall, at a minimum, **and to the extent such information is relevant and reasonably**
29 **available**, collect the following information: (v) Conditions and regulations in shoreland and adjacent areas
30 that affect shorelines, such as surface water management and land use regulations. This information **may be**
31 **useful** in achieving mutual consistency between the master program and other development regulations."

32 WAC 173-26-201(3)(d)(i). "(E) Local **governments should use the characterization** and analysis called for
in this section to prepare master program policies and regulations designed to achieve no net loss of
ecological functions necessary to support shoreline resources and to plan for the restoration of the ecosystem-
wide processes and individual ecological functions on a comprehensive basis over time." (emphasis added)

⁸² OFS Ex. 350 and ECY 000082. Jefferson County -- Shoreline Master Program Update -- *Cumulative
Impacts Analysis* (CIA) (February 2010) at 3-5 See also WAC 173-26-186(8)(d). "To ensure no net loss of
ecological functions and protection of other shoreline functions and/or uses, **master programs shall contain
policies, programs, and regulations** that address adverse cumulative impacts and fairly allocate the burden
of addressing cumulative impacts among development opportunities. Evaluation of such cumulative impacts
should consider: (i) current circumstances affecting the shorelines and relevant natural processes; (ii)
reasonably foreseeable future development and use of the shoreline; and (iii) beneficial effects of any
established regulatory programs under other local, state, and federal laws."(emphasis added)

1 The Board next considers allegations that the County violated WAC 173-26-191
2 because the County's SMP lacks a monitoring program to determine effects of the SMP
3 amendments.⁸³ OSF claims SMA Guidelines require mechanisms documenting shoreline
4 projects and evaluating cumulative effects including "monitoring impacts of approved
5 projects." OSF cited WAC 173-26-191(2)(a)(ii)(B) as the requirement for monitoring. The
6 Board disagrees with OSF's interpretation. The WAC requires local jurisdiction to "include
7 environment designation regulations that apply to specific environments consistent with
8 WAC 173-26-210." This is not a monitoring requirement. The Board notes that monitoring
9 requirements in the SMA and SMA Guidelines are generally targeted toward mitigation
10 projects, ocean uses, and aquaculture projects, not general development. (See footnote
11 below on monitoring requirements in WAC 173-26-201.⁸⁴) In addition, at the Hearing on the
12 Merits, the County explained that neither the SMA nor the Guidelines require the type of
13 monitoring alluded to by OSF. Rather, the County will monitor impacts of shoreline projects
14 through the County permitting process on a "permit-by-permit basis and a watershed-by-
15 watershed basis."⁸⁵ **The Board finds** OSF failed to prove the County did not comply with
16 WAC 173-26-191.
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21 ⁸³ OSF Brief at 14. "The State Guidelines require that a "mechanism" be in place in the SMP for documenting
22 all project review actions in shoreline areas. Local governments are required to identify a process for
23 "periodically evaluating" cumulative facts, which includes monitoring impacts of approved projects. See WAC
24 173-26-191(2)(a)(ii)(B). There is not an explicit mechanism for this process set out in the New SMP to monitor
25 NNL over time, a glaring oversight equal to the absence of a baseline."

26 ⁸⁴ WAC 173-26-201(2)(e)(i)(F): "Monitoring the impact and the compensation projects and taking appropriate
27 corrective measures." WAC 173-26-221(2)(c)(i)(F)(III): Wetlands...Compensatory mitigation. . . . Monitoring
28 (III) Establishment of **long-term monitoring** and reporting procedures to determine if performance standards
29 are met. WAC 173-26-201(2)(c)(iii)(B). "Comprehensive saltwater habitat management planning **should**
30 **identify methods for monitoring** conditions and adapting management practices to new information; WAC
31 173-26-241(3)(b)(i)(D) (iv) Conditional use permits for commercial geoduck aquaculture. . . (I) Local
32 governments should establish monitoring and reporting requirements necessary to verify that geoduck
aquaculture operations are in compliance with shoreline limits and conditions set forth in conditional use
permits and to support cumulative impacts analysis." See also 173-26-360 Ocean management.

⁸⁵ Hearing on the Merits Transcript (January 21, 2015) at 96-101 MR. JOHNSEN: "I'm happy to stand on the
position that we've taken, that there's no requirement under the guidelines that we have a monitoring system
that's been identified in the SMP in place, there is no such requirement." (Transcript at 101) MR. JOHNSEN:
"We've tried to evaluate on a permit-by-permit basis and a watershed-by-watershed basis how we're
mitigating. Are we succeeding or not? How many estuarine acres do we have that are in good condition now?
How many coastal wetlands acres are there? How much shoreline vegetation is there? Do the aerial photos
show compared to what it was in 2009, etc.?" (Transcript at 98).

1 For General Issue 1, OSF has not met its burden to establish the County failed to
2 meet requirements in the SMA or Guidelines regarding changed local circumstances,
3 collecting and monitoring scientific information or no net loss of ecological functions.

4 **For General Issue 1, the Board finds and concludes OSF failed to prove the**
5 **County did not comply with RCW 90.58.020, WAC 173-26-186, WAC 173-26-191, and**
6 **WAC 173-26-201.**
7

8 **General Issue No. 2**
9

10 Whether the SMP criteria are excessive and inconsistent with the SMA and the State
11 Guidelines. (*Discussing OSF Issues Nos. 2, 4, 5, 7 and 8 in Second Amended Order*)

12 2. Did Ordinance No. 07-1216-3 fail to comply with SMA policies RCW 90.58.020,
13 .030, .065, .090, .100(6), .130, .250, .270, .340, .620, and/or .710; the State
14 Guidelines (WAC Chapter 173-26), the Growth Management Act goals and
15 requirements, RCW 36.70A.480(3)(a) and (5) including internal consistency and
16 consistency with the Comprehensive Plan because the SMP unduly emphasized
17 aesthetics; did not balance reasonable uses; failed to address beneficial uses; failed
to balance SMA values; failed to protect property rights; etc.?

18 4. Did Jefferson County's adoption of Ordinance No. 07-1216-13 fail to comply
19 with the provisions set forth in RCW 90.58.020, .030(3)(e), .100 and/or WAC 173-26-
20 176(2), WAC 173-26-221(5)(b), WAC 173-26-186(4) and (8)(C), WAC 173-26-
21 191(2)(a)(iii)(A) because the showings required to obtain permits for common
22 shoreline facilities as beach access structures, boating facilities, and armoring, as
well as any development in flood-prone areas are beyond those required?

23 5. Did Jefferson County's adoption of Ordinance No. 07-1216-13 fail to comply
24 with the requirements of RCW 90.58.020, .030(3)(e) and .050 because the SMP
25 permitting requirements are too restrictive and/or impermissibly shift the burden of
26 proof to an applicant?

27 7. Whether Respondents' failure to treat existing shoreline homes as conforming in
28 violation of RCW 90.58.620 is clearly erroneous?

29 8. Whether "no net loss" is a concept inapplicable to individual permitting decisions
30 except for expansion and/or remodel of conforming structures as specified in RCW
31 90.58.620 and, if not, whether no net loss is satisfied by a property owner complying
32 with mitigation sequencing set out in the SMA and the balancing policies found in
RCW 90.58.020? Stated differently, do the referenced policies control designation

1 and regulation of critical areas located in SMA jurisdiction as mandated by RCW
2 90.58.160 and RCW 36.70A 480?

3 **Applicable Laws**⁸⁶

- 4
- 5 • RCW 90.58.020
 - 6 • WAC 173-26-090

7 **Position of the Parties**

8 *Petitioners*

9 OSF complains the County's SMP criteria are excessive and inconsistent with SMA
10 and SMP Guidelines, specifically WAC 173-26-090.⁸⁷ OSF makes the following assertions:

11 First, OSF argues local circumstances are the determinative factor for a jurisdiction's
12 decision to amend its SMP.⁸⁸ WAC 173-26-090 requires amending an SMP when necessary
13 to reflect changing local circumstances. OSF argues there have been no changed local
14 circumstances to warrant amending the SMP. In addition, it suggests the intensity of land
15 use and frequency of development should dictate the level of regulation.⁸⁹

16 Second, OSF claims the concept of "no net loss" (NNL) is not an SMA policy, is not
17 defined in the SMA and the County cannot use NNL to "trump the SMA balancing policies
18 found in RCW 90.58.020." OSF also claims the County and Ecology use different
19 definitions of NNL and neither definition is consistent with the SMA balancing priorities in
20 RCW 90.58.020.⁹⁰

21 Third, OSF asserts a well-established, site-specific permit process employing
22 SMA/SEPA requirements is in place to balance the needs of shoreline development and
23 protection. OSF contends "there is an obvious prejudice by Respondents against use of the
24
25
26

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28 ⁸⁶ For lack of legal argument, the following are considered abandoned: RCW 90.58.050, .065, .090, .100(6),
29 .130, .250, .270, .340, .480, .710; WAC 173-26-176(2), -221(5)(b), -191(2)(a)(iii)(A).

30 ⁸⁷ OSF Brief at 15 and WAC 173-26-090. "Periodic review—Public involvement encouraged—Amendment of
31 comprehensive plans, development regulations and master programs. Each local government should
32 periodically review a shoreline master program under its jurisdiction and make amendments to the master
program deemed necessary to reflect changing local circumstances, new information or improved data."

⁸⁸ In OSF's Summary of Arguments at 3, OSF claims WAC 173-26-090 requires SMP amendments only if the
County and Ecology can show changed circumstances necessitating SMP amendments. The Board
addresses the argument of local or changed circumstances here in Issue 2.

⁸⁹ *Id.* at 15.

⁹⁰ *Id.* at 17-18.

1 existing permit system, but this system must be used” in accordance with RCW 90.58.140.⁹¹
2 OSF adds “the SMP applies permitting standards impossible to meet.”⁹²

3 Fourth, OSF argues the County’s application of the term “nonconforming” to over 900
4 shoreline parcels will result in a “wholesale determination that all existing uses and
5 developments encompassed within the new 150-foot generic buffer are now nonconforming”
6 and will conflict with the County’s Comprehensive Plan.⁹³

8 *Respondents*

9
10 Although Jefferson County asserts OSF abandoned any claim of inconsistency under
11 General Issue 2’s argument, the Board notes those arguments were presented under
12 General Issue 8 and will address those claims in Issue 8 below.

13 Jefferson County observes the County is required to follow statutory directives and
14 Ecology’s guidelines, both of which required the County to update its SMP regardless of the
15 changed or unchanged nature of growth in the County. Local circumstances are to be
16 considered in the SMP including new scientific information available since the last SMP
17 update. The County must use new information to implement the law and guidelines
18 regardless of the changed or unchanged nature of growth in Jefferson County. The fact that
19 Jefferson County’s shorelines are “relatively healthy” only places greater importance on
20 preserving them.⁹⁴

21
22 The County responds that OSF provided no legal argument for using the permit
23 process to implement the SMA on a case-by-case basis as opposed to coordinated
24 planning pursuant to an SMP. The County cites *OSF v. WWGMHB* in which the Court of
25 Appeals affirmed a Board decision to reject a “permit only” process to implement the GMA.
26 The County urges the Board to reject OSF’s claim that SMA requirements can be
27 implemented through permits.⁹⁵

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31 ⁹¹ *Id.* at 20.

32 ⁹² *Id.* at 20.

⁹³ *Id.* at 21.

⁹⁴ Jefferson County Brief (January 5, 2015) at 16.

⁹⁵ *Id.* at 17 and *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 274 P.3d 1040, 2012 Wn. App. LEXIS 129 (Wash. Ct. App. 2012).

1 The County explains that creating “nonconforming uses” is a long-standing planning
2 practice in Washington State and the designation does not deprive an owner of legal uses
3 of their property.⁹⁶ The County explains that responding to new information regarding the
4 need to, and best methods for, protecting the environment without depriving a property
5 owner of existing legal uses has long been done in Washington by allowing uses, which in
6 the future will be non-conforming to continue. The practice is intended to respond to
7 petitioners' concerns while enabling the County to regulate future development such that
8 environmental concerns are addressed.
9

10 The County points to SMP Article 10.6 which states existing uses not meeting SMP
11 standards may still continue as long as they meet certain criteria. The County explains the
12 SMP allows existing uses to expand if conditions are met. And, as with the prior issue
13 statement, the County says OSF cited no legal authority supporting its claim that the
14 nonconforming use doctrine violates the SMA.⁹⁷
15

16 The County rejects OSF's complaint about balancing RCW 90.58.020 requirements
17 arguing the SMA does not require an economic impact statement and its foremost priority is
18 protection of the natural environment, and that “development should be allowed only when
19 consistent with the control of pollution and prevention of environmental damage.”⁹⁸ The
20 County necessarily considered economic factors along with other goals and policies as well
21 as applying the SMA concept of protecting the environment “where feasible.”⁹⁹
22

23 Respondent Ecology observes OSF overstates the “balancing function of the SMA” in
24 regards to its NNL argument. Ecology explains RCW 90.58.900 requires a local SMP to be
25 broadly construed to protect the State's shorelines as fully as possible and an SMP's NNL
26 policy implements the statutes and the guidelines.¹⁰⁰ Ecology explains that “NNL is
27

28 ⁹⁶ Jefferson County Brief at 17. “The argument flies in the face of decades of Washington case law, which has
29 consistently recognized and affirmed the right of local jurisdictions to apply the “nonconforming use”
30 classification to structures and uses which were approved under previous zoning and environmental
31 regulations, but which are no longer consistent with updated regulations. See, *State ex rel. Miller v. Cain*, 40
32 Wn.2d 216, 218, 242 P.2d 505 (1952); *Development and Entitlement Services v. King County*, 177 Wn.2d 636,
643, 305 P.3d 240 (2013).”

⁹⁷ Jefferson County Brief at 18.

⁹⁸ RCW 90.58.020.

⁹⁹ *Id.* at 18-19.

¹⁰⁰ Ecology Brief at 16.

1 achieved at the planning level through the SMP's establishment of shoreline designations,
2 SMP policies and regulations, and restoration planning. Sole reliance on the permitting
3 process is insufficient to ensure NNL."¹⁰¹ Ecology cites WAC 173-26-186(8)(b) to
4 substantiate its argument that NNL must be achieved through both an SMP and
5 permitting.¹⁰²
6

7 **Board Discussion, Analysis, and Conclusion**

8
9 As with the previous issue OSF fails to support many of the alleged violations in
10 General Issue 2.¹⁰³ Alleging a violation of statute or rule without presenting argument
11 constitutes abandonment of the issue. Alleged violations of those RCW and WAC sections
12 are dismissed. Next, OSF asks the Board to determine whether the SMP criteria are
13 "excessive and inconsistent" with the GMA, the SMA and the State Guidelines. Finally,
14 allegations regarding inconsistencies are addressed under General Issue 8 below.
15

16 *Local Circumstances*

17 The essence of OSF's argument is that there have been no changes that would
18 trigger the WAC 173-26-090 directive to: ". . . make amendments to the master program
19 deemed necessary to reflect changing local circumstances, new information or improved
20 data".¹⁰⁴ OSF failed to consider the requirement of RCW 90.58.080(2)(a)(iii) which directed
21 Jefferson County to amend its master program on or before December 1, 2011.¹⁰⁵ In
22

23
24 ¹⁰¹ *Id.* at 19. WAC 173-26-186(8). This is also true for exempt development. WAC 173-26-191(2)(a)(iii)(A)
25 ("The Shoreline Management Act's provisions are intended to provide for the management of all development
26 and uses within the jurisdiction, whether or not a shoreline permit is required.").

27 ¹⁰² See WAC 173-26-186(8). ". . . The principle regarding protecting shoreline ecological systems is
28 accomplished by these guidelines in several ways, and in the context of related principles. These include . . .
29 (b) Local master programs shall include **policies and regulations** designed to achieve no net loss of those
30 ecological functions. (i) Local master programs shall include regulations and mitigation **standards ensuring**
31 **that each permitted development will not cause a net loss** of ecological functions of the shoreline; local
32 government shall design and implement such regulations and mitigation standards in a manner consistent with
all relevant constitutional and other legal limitations on the regulation of private property. (emphasis added)

¹⁰³ For lack of legal argument, the following are considered abandoned: RCW 90.58.050, .065, .090, .100(6),
.130, .160, .250, .270, .340, .480, .710; WAC 173-26-176(2), -221(5)(b), -191(2)(a)(iii)(A).

¹⁰⁴ OSF Brief at 15.

¹⁰⁵ RCW 90.58.080(2)(a). ". . . each local government subject to this chapter shall develop or amend its
master program for the regulation of uses of shorelines within its jurisdiction according to the following
schedule: (iii) . . . On or before December 1, 2011, for . . . Jefferson . . . counties and the cities within those
counties."

1 regards to OSF's argument that changing conditions should govern when an SMP is
2 updated, the Board found that WAC 173-26-090 states a local jurisdiction *should*
3 periodically review an SMP to reflect changing conditions and *shall* review an SMP to "to
4 comply with the requirements of RCW 90.58.080 and any applicable guidelines issued by
5 the department."¹⁰⁶ Ecology issued new guidelines after the County's last SMP, thus the
6 County was required to update its SMP by 2011. OSF's "base inquiry" that the SMP need
7 not have been updated based on changing local circumstances reflects a misunderstanding
8 of the law. **The Board finds** OSF has failed to meet either burden of proof to establish the
9 County did not meet requirements in WAC 173-26-090.
10

11 *No Net Loss*

12 OSF argues "no net loss" (NNL) is not an SMA policy nor defined in the SMA and
13 cannot be used to "trump the SMA balancing policies found in RCW 90.58.020." Ecology
14 counters by pointing to WAC 173-26-186(8)(b) which states NNL must be achieved through
15 both an SMP and permitting.¹⁰⁷
16

17 In this case, the Board finds that RCW 90.58.020 establishes state policy to manage
18 shorelines with an emphasis on the maintenance, protection, restoration, and preservation
19 of "fragile" shoreline "natural resources," "public health," "the land and its vegetation and
20 wildlife," "the waters and their aquatic life," "ecology," and "environment."¹⁰⁸ The
21 Legislature added the concept of NNL in RCW 90.58.620 by authorizing changes in
22 occupancy or residential structures **only** if changes are consistent with the SMP, "including
23
24
25
26
27

28 ¹⁰⁶ WAC 173-26-090 Periodic Review.

29 ¹⁰⁷ See WAC 173-26-186(8) ".....The principle regarding protecting shoreline ecological systems is
30 accomplished by these guidelines in several ways, and in the context of related principles. These include . .
31 .(b) Local master programs shall include **policies and regulations** designed to achieve **no net loss** of those
32 ecological functions. (i) Local master programs shall include regulations and mitigation **standards ensuring**
that each permitted development will not cause a net loss of ecological functions of the shoreline; local
government shall design and implement such regulations and mitigation standards in a manner consistent with
all relevant constitutional and other legal limitations on the regulation of private property. (emphasis added)

¹⁰⁸ RCW 90.58.020 Legislative findings — State policy enunciated — Use preference. The legislature finds
that the shorelines of the state are among the most valuable and fragile of its natural resources and that there
is great concern throughout the state relating to their utilization, protection, restoration, and preservation.

1 requirements for **no net loss of** shoreline ecological functions.”¹⁰⁹ To implement these
2 policy directives, RCW 90.58.060 authorizes Ecology to adopt Guidelines consistent with
3 RCW 90.58.020 and Ecology adopted WAC 173-26 to do just that. Part III of WAC 173-26
4 are the “Guidelines” developed to assist local governments update SMPs. (See subsections
5 WAC 173-26-171 through WAC 173-26-251 as the “Guidelines”) Within the Guidelines,
6 WAC 173-26-186(8) establishes the governing principles of the Guidelines, and sets forth
7 the No Net Loss standard that applies to SMPs. See WAC 173-26-186(8):
8

9 Through numerous references to and emphasis on the maintenance,
10 protection, restoration, and preservation ...the act makes protection of the
11 shoreline environment an essential statewide policy goal consistent with the
12 other policy goals of the act. ...The principle regarding protecting shoreline
13 ecological systems is accomplished by these guidelines in several ways, and
14 in the context of related principles. These include:

15 (a) Local government is guided in its review and amendment of local
16 master programs so that it uses a process that identifies, inventories, and
17 ensures meaningful understanding of current and potential ecological
18 functions provided by affected shorelines.

19 (b) Local master programs **shall include policies and regulations**
20 designed to achieve **no net loss of those ecological functions**.
21

22 Jefferson County was correct to include the concept of no net loss in its SMP as it is
23 required in WAC 173-26-186(8) which in turn is authorized by the SMA. **The Board finds**
24 OSF was unable to carry its burden to establish a violation of to RCW 90.58.020.
25

26 *SMA Permitting*

27 The Board agrees with the Respondents that the SMA provides for the protection of
28 shorelines through development of SMPs, as opposed to solely through a case-by-case
29 permitting system. The SMA was adopted to create a jurisdiction-wide planning process to
30 outline long-range goals to prevent further degradation of shorelines. WAC 173-26-186(8)
31 establishes the principle that “protecting shoreline ecological systems is accomplished by
32

¹⁰⁹ RCW 90.58.620 New or amended master programs — Authorized provisions. (1) New or amended master programs approved by the department on or after September 1, 2011, may include provisions authorizing . . .
(b) Redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure if it is consistent with the master program, **including requirements for no net loss of shoreline ecological functions**.

1 these guidelines in several ways” including “a process that identifies, inventories, and
2 ensures meaningful understanding of current and potential ecological functions provided by
3 affected shorelines” as well as containing “policies and regulations designed to achieve no
4 net loss of those ecological functions.” SMPs are to include “regulations and mitigation
5 standards ensuring that each **permitted** development will not cause a net loss of ecological
6 functions of the shoreline.”¹¹⁰ Thus, an SMP must include policies, regulations and a
7 permitting process to implement the SMA and the SMA guidelines.¹¹¹ RCW 90.58 and
8 WAC 173-26 intend local governments to implement the goals of the SMA through a
9 combination of policies and regulations expressed in the SMP and permits for individual
10 projects.¹¹²
11
12
13

14 ¹¹⁰ WAC 173-26-186(8)(b)(i).

15 ¹¹¹ WAC 173-26-186(8): “Through numerous references to and emphasis on the maintenance, protection,
16 restoration, and preservation of ‘fragile’ shoreline ‘natural resources,’ ‘public health,’ ‘the land and its
17 vegetation and wildlife,’ ‘the waters and their aquatic life,’ ‘ecology,’ and ‘environment,’ the act makes
18 protection of the shoreline environment an essential statewide policy goal consistent with the other policy
19 goals of the act. It is recognized that shoreline ecological functions may be impaired not only by shoreline
20 development subject to the substantial development permit requirement of the act but also by past actions,
unregulated activities, and development that is exempt from the act’s permit requirements. The principle
regarding protecting shoreline ecological systems is accomplished by these guidelines in several ways, and in
the context of related principles. These include:

21 (a) Local government is guided in its review and amendment of local master programs so that it uses a
22 process that identifies, inventories, and ensures meaningful understanding of current and potential ecological
functions provided by affected shorelines.

23 (b) Local master programs shall include policies and regulations designed to achieve no net loss of those
ecological functions.

24 (i) Local master programs shall include regulations and mitigation standards ensuring that each permitted
25 development will not cause a net loss of ecological functions of the shoreline; local government shall design
and implement such regulations and mitigation standards in a manner consistent with all relevant constitutional
26 and other legal limitations on the regulation of private property.

27 (ii) Local master programs shall include regulations ensuring that exempt development in the aggregate
will not cause a net loss of ecological functions of the shoreline.”

28 ¹¹² RCW 90.58.020. “**Permitted uses** in the shorelines of the state shall be designed and conducted in a
29 manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the
shoreline area and any interference with the public’s use of the water.”

30 RCW 90.58.080. “(1) Local governments shall **develop or amend a master program** for regulation of uses of
the shorelines of the state consistent with the required elements of the guidelines adopted by the department
31 in accordance with the schedule established by this section.”

32 WAC 173-26-030(1). “Chapter 90.58 RCW requires all local governments with shorelines of the state within
their boundaries **to develop and administer a shoreline master program.**”

WAC 173-26-191(1)(a). “The results of shoreline planning are summarized in shoreline master program
policies that establish broad shoreline management directives. **The policies are the basis for regulations
that govern use and development along the shoreline.**”

1 OSF's claim that the County could protect shorelines though permitting alone is
2 unfounded. The Board identifies law and administrative codes which support both planning
3 and permitting as the method to protect and manage shorelines. **The Board finds** OSF was
4 unable to carry its burden to establish a violation of RCW 90.58.020 or WAC 173-26-090.

5
6 *Non-Conforming*

7 OSF cites no legal authority to substantiate its claim that non-conforming
8 designations for land parcels are "contrary to law."¹¹³ Nor does OSF explain how a non-
9 conforming designation in the SMP, which protects non-conforming uses and allows them to
10 be replaced or expand, "conflicts with the Comprehensive Plan."¹¹⁴ OSF asserts the SMP
11 does not allow replacement of a destroyed non-conforming structure and the SMP "imposes
12 too many requirements . . . provides uncompensated view easements to adjacent
13 properties, which is illegal."¹¹⁵

14
15 The Board first examines SMP Article 6: *General Policies and Regulations* and Article
16 10: *Administration and Enforcement* which contains policies guiding non-conforming
17 uses.¹¹⁶ Existing uses and buildings not meeting SMP standards are allowed to continue as
18 non-conforming. If uses or buildings change, the SMP provides discretionary requirements
19 for non-conforming uses. For example, Article 6.1.A. contains language about views stating
20 "Single-family residential development on non-conforming lots **should** not substantially
21 impair the view of the adjacent residences."¹¹⁷ This is **policy** language and OSF does not
22 demonstrate how it results in a violation.¹¹⁸ Next, the SMP provisions protect critical areas
23 by requiring that a parcel constrained by critical areas or buffers "shall not be subdivided to
24 create parcels that . . . would be considered non-conforming."¹¹⁹ The Board understands
25 that OSF does not like the label "non-conforming," but OSF does not provide legal argument
26
27

28
29 ¹¹³ OSF Brief at 21.

30 ¹¹⁴ *Id.*

31 ¹¹⁵ *Id.*

32 ¹¹⁶ ECY 008189, Jefferson County Ordinance # 07-1216-13; Ex. A Jefferson County SMP Update at 6-2- 6-7,
10-6.

¹¹⁷ *Id.* at 6-2.

¹¹⁸ The goals and policies of an SMP constitute elements of a jurisdiction's comprehensive plan. RCW
36.70A.480(1). It is the development regulations which implement comprehensive plan policies.

¹¹⁹ *Id.* at 6-4.

1 to support its contention that the County should not impose restrictions on subdividing within
2 critical areas that would result in creating new non-conformities. Such restriction is in
3 keeping with the purpose of protecting the functions and values of critical areas as stated in
4 the County's Critical Area Ordinance and incorporated into the County's SMP.¹²⁰

5 In addition, SMP Article 10 describes how non-conforming developments may
6 continue with normal maintenance and repair, replacement, re-location and expansion even
7 though they have been designated as "non-conforming."¹²¹ Another source of flexibility in
8 the SMP for non-conforming lots is found in Article 10.6.E. which may allow new single-
9 family residential development outside the standard shoreline buffer without a variance if
10 they comply with non-conforming provisions in Article 6.1.¹²² OSF provided no legal
11 analysis showing how the SMP's permissive and flexible non-conforming policies violate the
12 SMA or the Guidelines.
13

14 For General Issue 2, OSF has not met its burden to establish the County failed to
15 meet requirements in the SMA or Guidelines regarding local circumstances, no net loss of
16 ecological functions, SMA permitting or nonconforming classifications.
17

18 **For General Issue 2, the Board finds and concludes OSF has failed to carry its**
19 **burden proving the County did not comply with RCW 90.58.020 or WAC 173-26-090.**
20

21 **General Issue No. 3**

22 Whether the SMP's new shoreline buffers, vegetation conservation area and setbacks are
23 illegal. (*Discussing OSF Issue No. 6*)

24 6. Whether the shoreline buffers, vegetation conservation areas and setbacks
25 required by the SMP (see Art. 6.1.D.4, 5, Art. 5(3)(A), p.5-2, Art. 6(3)(A)(11), p.6-16,
26 Art. 6(4) (a)(1), p. 6-18, Art. 6(5)("Vegetation Conservation"), pp.6-18 to 6-22, Art.
27 7(1)(A)(6), p.7-1, SMP. Art. 8(8)(A)(2), p.8-36, inter alia) are excessively large when
28 evaluated against the requirements of RCW 90.58.100(1), (1)(a), (d), (e), 2(a), and
29 WAC 173-26-090, 201(2), 221(2), (5), 192(2)(a); 231(2), 241(2), (3), and 251(3) and
30 otherwise are inconsistent with the balancing policies of RCW 90.58.020?

31 ¹²⁰ *Id.* at Appendix B – JCC 18.22 Critical Areas Ordinance.

32 ¹²¹ ECY 008189, Jefferson County Ordinance # 07-1216-13, Ex. A Jefferson County SMP Update at 10-6.

¹²² *Id.* at 10-6 Art. 10.6.E. New single-family residential development on lots whose dimensions do not allow a residence to be constructed outside the standard shoreline buffer **may be allowed without a variance** in accordance with the provision in Article 6 section 1 (Nonconforming Lots).

1 Applicable Laws¹²³

- 2 • WAC 173-26-221

3
4 Position of the Parties

5 OSF contends the SMP buffers, vegetation conservation areas and setbacks are
6 illegal, violate WAC 173-26-186(5),¹²⁴ contain inadequate scientific evidence and thus, the
7 SMP should be found invalid. Citing WAC 173-26-221(2)(a) and (c), OSF criticizes the
8 County for inappropriately applying buffers to freshwater habitats arguing the Guidelines
9 only require buffer areas around wetlands within shoreline jurisdiction but not for critical
10 freshwater habitat or nearshore marine areas.¹²⁵ Regarding scientific studies used in
11 developing the SMP, OSF contends the County selected scientific studies to justify using a
12 buffer width adopted in Whatcom County because Ecology suggested this size.¹²⁶ OSF
13 promotes scientific expertise on buffers from Dr. Michael Dosskey, which it contends the
14 County could have relied upon but did not.¹²⁷ Overall, OSF argues the County did not
15 demonstrate “problems” necessitating a new SMP nor did the County justify 150-foot buffers
16 and conservation vegetation found in the SMP.¹²⁸ In its reply brief, OSF argues not all of
17 the County shorelines are critical areas and thus do not warrant the application of the CAO
18 in the SMP.¹²⁹

19
20
21 The SMP includes standard 150-foot buffers from shores and rivers and 100-foot
22 buffers from lakeshores. Jefferson County explains the SMP buffer and vegetation
23

24
25 ¹²³ For lack of legal argument, the following are considered abandoned: RCW 90.58.020; RCW 90.58.100;
26 WAC 173-26-090, -192(sic), -231, -241, -251.

27 ¹²⁴ OSF’s Issue 6 does not allege a violation of WAC 173-26-186(5). The Board is precluded from issuing
28 advisory opinions. See RCW 36.70A.290 (1): All requests for review to the growth management hearings
29 board shall be initiated by filing a petition that includes a detailed statement of issues presented for resolution
30 by the board. The board shall render written decisions articulating the basis for its holdings. **The board shall**
31 **not issue advisory opinions on issues not presented to the board in the statement of issues, as**
32 **modified by any prehearing order.** WAC 242-03-210. “ A petition for review shall substantially contain: . . .
(2) (c) A detailed statement of the issues presented for resolution by the board that specifies the provision(s) of
the act or other statute allegedly being violated and, if applicable, the provision(s) of the document that is
being appealed.”

¹²⁵ OSF Brief at 22.

¹²⁶ *Id.* at 25.

¹²⁷ *Id.* at 26.

¹²⁸ *Id.* at 24.

¹²⁹ OFS Reply Brief at 14 (January 16, 2015).

1 requirements are consistent with WAC 173-26-221(2) and (5) which allow for the adoption of
2 such conservation measures. The SMA allows local jurisdictions flexibility to adopt
3 regulatory requirements as long as they are grounded in scientific evidence. The County
4 offers scientific evidence from its Inventory and Cumulative Effects Analysis to explain why it
5 selected the 100- and 150-foot buffers.¹³⁰ Contrary to the allegations, it states the buffers
6 do not impose a “blanket no touch” restriction on all properties. Instead, it allows up to 20%
7 of the shoreline (or 15 linear feet, if greater) to be altered. Saltwater areas have been
8 designated as critical areas under the CAO because listed species are found in nearshore
9 habitats and along marine shorelines and those shorelines have been designated as Fish
10 and Wildlife Habitat Areas under the CAO. Similarly, many freshwater areas have been so
11 designated. Both fresh and marine shorelines are designated as they overlap with GMA-
12 designated critical areas.¹³¹ The County explains the SMP buffers are the same as those
13 adopted in the County’s GMA-compliant Critical Area Ordinance, but they were
14 independently derived by analyzing scientific data and shoreline conditions. The County
15 clarifies it did not designate CAOs when it adopted the SMP, but CAO buffers were
16 consistent with SMP buffers based on scientific analysis.¹³² Finally, Ecology reviewed the
17 County’s scientific analysis, the requirements for vegetation conservation and buffers and
18 found them in compliance with SMA policies and guidelines.¹³³ Ecology defers to the
19 County’s arguments regarding General Issue 3.¹³⁴

23 **Discussion, Analysis, and Board Conclusion**

24 OSF fails to cite and argue several alleged violations in General Issue 3. Alleged
25 violations of statute or rule without presenting legal argument constitute abandonment of the
26 issue. Alleged violations of those RCW and WAC sections are dismissed.¹³⁵

30 ¹³⁰ Jefferson County Brief at 21.

31 ¹³¹ *Id.* at 22.

32 ¹³² *Id.* at 21-22

¹³³ *Id.* at 22.

¹³⁴ Ecology Brief, p. 20.

¹³⁵ For lack of legal argument, the following are considered abandoned: RCW 90.58.020; RCW 90.58.100;
WAC 173-26-090; -201; -192(sic), -231, -241, -251.

OSF presents three confusing arguments around the concept of applying the existing County CAO to the SMP and establishing regulations for shoreline buffers and conserving vegetation. They argue buffers are excessive, the science used by the County was incomplete and the buffer and vegetation conservation requirements are not proportionate to developments' impacts.¹³⁶

Excessive Buffers

A significant portion of OSF's argument under General Issue 3 appears to relate to allegations of violations of WAC 173-27-186 and related constitutional claims.¹³⁷ Beyond that, OSF alleges the SMP inappropriately applies buffers to all shorelines, including critical freshwater habitats and nearshore marine areas, and so violates WAC 173-26-221(2)(c).

OSF states:

The State Guidelines make it clear that SMP's "shall contain requirements for buffer area zones around wetlands within shoreline jurisdiction," (WAC 173-26-221(2)(a)(ii)(D)), but they contain no such mandatory requirement for "critical freshwater habitats" including larger lakes or streams, or the nearshore marine area.¹³⁸

Apparently, OSF's argument is that without a similar directive applicable to lakes, streams, and nearshore marine areas, the County was precluded from adopting buffers and vegetation conservation provisions.¹³⁹

The six elements required to be addressed in an SMP by WAC 173-26-221 are archaeological and historical resources; **critical areas**; flood hazard areas; public access;

¹³⁶ OSF Brief at 22.

¹³⁷ OSF Brief, p.23, 24: "The protection mechanisms are applied to private properties without adherence to nexus, proportionality and reasonable necessity limits on government." "The OSF Petitioners focus more on the reasonably necessary test rather than "nexus" or the "roughly proportional to the problem created by the development" test" "The error inherent in the New SMP is that it imposes mitigation in the form of buffers (environmental easements or servitudes) on all shorelines. . . ." As noted above, violations of WAC 173-27-186 were not alleged. Consequently, the Board is precluded from addressing them under this issue. Furthermore, the Board has no jurisdiction to consider constitutional issues.

¹³⁸ OSF Brief at 22.

¹³⁹ *Id.* at 22.

1 **shoreline vegetation conservation**; water quality, storm water, and nonpoint pollution¹⁴⁰
2 (emphasis added). The SMP must address, for each category, where that element applies,
3 as well as specific principles and standards. (WAC 173-26-221).

4 For example, for critical areas the “**application**” is that “shoreline master programs
5 must provide for management of critical areas,” including a provision of no net loss to
6 shoreline ecological functions.¹⁴¹ There are five “**principles**” which must be implemented
7 for critical areas including using “scientific and technical information” and applying planning
8 principles to protect existing ecological functions.¹⁴² The “**standards**” by which the County
9 implements its SMP for critical areas includes four sub-categories relating to critical areas:
10 (i) wetlands, (ii) Geologically hazardous areas; (iii) critical saltwater habitats; and (iv) critical
11 freshwater habitats.¹⁴³ OSF complains WAC 173-26-221 does not mandate buffers for
12 critical saltwater and freshwater habitats, but the SMP applies buffers anyway.¹⁴⁴

13
14 The answer to OSF’s argument that applying buffers to all shorelines, including
15 critical freshwater habitats and nearshore marine areas violates WAC 173-26-221 is
16 included in the rule itself. WAC 173-26-221(2)(a) specifically allows a city or county to
17 “include in its master program **land necessary for buffers for critical areas** (as defined in
18
19
20
21

22 ¹⁴⁰ WAC 173-26-221 contains six categories: archaeological and historical resources; critical areas; flood
23 hazard areas; public access; shoreline vegetation conservation; water quality, storm water, and nonpoint
24 pollution.

25 ¹⁴¹ WAC 173-26-221(2) “Critical Areas (a) Application. Pursuant to the provisions of RCW 90.58.090(4) and
26 36.70A.480(3) as amended by chapter 107, Laws of 2010 (EHB 1653), shoreline master programs must
27 provide for management of critical areas designated as such pursuant to RCW 36.70A.170 (1)(d) located
28 within the shorelines of the state with policies and regulations that: (i) Are consistent with the specific
29 provisions of this subsection (2) critical areas and subsection (3) of this section flood hazard reduction, and
30 these guidelines; and (ii) **Provide a level of protection to critical areas within the shoreline area that
31 assures no net loss of shoreline ecological functions necessary to sustain shoreline natural
32 resources.**”

33 ¹⁴² WAC 173-26-221(2)(b) “Principles (i) Shoreline master programs **shall adhere to the standards
34 established in the following sections**, unless it is demonstrated through scientific and technical information
35 as provided in RCW 90.58.100(1) and as described in WAC 173-26-201(2)(a) that an alternative approach
36 provides better resource protection . . . (iv) The planning objectives of shoreline management provisions for
37 critical areas **shall be the protection of existing ecological functions and ecosystem-wide processes
38 and restoration of degraded ecological functions and ecosystem-wide processes.** The regulatory
39 provisions for critical areas **shall protect** existing ecological functions and ecosystem-wide processes.”

40 ¹⁴³ WAC 173-26-221(2)(c) [Critical Area] Standards.”

41 ¹⁴⁴ OSF Brief at 22.

chapter 36.70A RCW) occurring within shorelines of the state. . . .¹⁴⁵ Jefferson County has designated its marine shorelines and much of its freshwater shorelines as critical areas:

The shoreline buffers and vegetation conservation areas included in the SMP are supported by science and by safety considerations and are consistent with Jefferson County's CAO. The treatment of saltwater shorelines as critical areas in the CAO is justified because the shorelines in Jefferson County have been found to provide habitat for listed species and therefore qualify as critical areas, *i.e.*, Fish and Wildlife Habitat Conservation Areas under the CAO. (See, SI, pp. 3-6 through 3-22; SMP Article 6, p. 6-5; JCC 18.22.270). Both freshwater and marine shorelines, as determined by SMA, overlap with GMA-designated fish and wildlife habitat critical areas. The independent application of separate definitions, nomenclature and criteria yield nearly-identical results for the location of natural resources in need of protection.¹⁴⁶

The internal references in that quote include one to the Final SI¹⁴⁷ at pages 3-6 through 3-22. Those pages list the types and locations of threatened and endangered species and habitats, both nearshore and freshwater habitats and species as well as terrestrial habitats and species.

3.2.1 Threatened and Endangered Species and Critical Habitats
Jefferson County is home to several state and/or federally listed and proposed threatened and endangered species and critical habitats.¹⁴⁸

3.2.1.1 Salmonids
Salmonids (including both federally listed and non-listed species) use streams, rivers, and nearshore habitats throughout Jefferson County.¹⁴⁹

¹⁴⁵ WAC 173-26-221(2)(a): "As provided in RCW 90.58.030 (2)(f)(ii) and 36.70A.480, as amended by chapter 321, Laws of 2003 (ESHB 1933), any city or county **may also include in its master program land necessary for buffers for critical areas**, as defined in chapter 36.70A RCW, that occur within shorelines of the state . . . If a local government does not include land necessary for buffers for critical areas that occur within shorelines of the state, as authorized above, then the local jurisdiction shall continue to regulate those critical areas and required buffers pursuant to RCW 36.70A.060(2).. . . In addition to critical areas defined under chapter 36.70A RCW and critical saltwater and freshwater habitats as described in these guidelines, local governments should identify additional shoreline areas that warrant special protection necessary to achieve no net loss of ecological functions."

¹⁴⁶ Jefferson County Brief, p. 22; See also SMP Appendix B, the County's Critical Areas Ordinance at JCC 18.22.270.

¹⁴⁷ OSF Ex. 124 and ECY003927. *Jefferson County Final Shoreline Inventory and Characterization Report (SI)* – Revised November 2008 at 3-6 through 3-22.

¹⁴⁸ *Id.* at 3-6.

3.2.2 Nearshore Habitats and Species

Key nearshore marine habitats in Jefferson County include eelgrass and kelp beds; shellfish beds; forage fish spawning areas; marine mammal habitats (seal and sea lion haulouts); seabird/waterfowl concentration areas; estuaries and other intertidal wetlands/marshes, and nearshore riparian habitats.¹⁵⁰

In addition, WAC 173-26-221(2)(c)(iii) and (iv) requires jurisdictions to address two specific types of critical areas: critical saltwater and critical freshwater habitats. The former are defined as:

Critical saltwater habitats include all kelp beds, eelgrass beds, spawning and holding areas for forage fish, such as herring, smelt and sandlance; subsistence, commercial and recreational shellfish beds; mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association. Critical saltwater habitats require a higher level of protection due to the important ecological functions they provide. Ecological functions of marine shorelands can affect the viability of critical saltwater habitats. Therefore, effective protection and restoration of critical saltwater habitats should integrate management of shorelands as well as submerged areas.

The location of many critical saltwater habitats, including shellfish beds, mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association are included in the County's Final SI.¹⁵¹

The Board further notes that WAC 173-26-221(2)(c)(iv) contains specific principles and standards to protect critical freshwater habitats.¹⁵² These include regulating uses and

¹⁴⁹ *Id.* at 3-8.

¹⁵⁰ *Id.* at 3-9.

¹⁵¹ *Id.* at Section 4.0 *Reach Inventory and Analysis*.

¹⁵² WAC 173-26-221(2)(c)(iv) **Critical freshwater habitats** "A. Principles...Many ecological functions of lake, river and stream corridors depend both on continuity and connectivity along the length of the shoreline and on the **conditions of the surrounding lands** on either side of river channel and lake basin. Environmental degradation caused by development such as improper storm water sewer or industrial outfalls, unmanaged clearing and grading, or runoff from buildings and parking lots within the watershed, can degrade ecological functions in lakes and downstream.... gradual destruction or loss of riparian and associated upland native plant communities, alteration of runoff quality and quantity along the lake basin and stream corridor... Therefore, effective management of lake basins and river and stream corridors depends on: ... (II) **Regulating uses and development** within lake basins and stream channels, associated channel migration zones, wetlands, and the flood plains, **to the extent such areas are in the shoreline jurisdictional area, as necessary to assure no net loss of ecological functions, including where applicable the associated hyporheic zone**, results from new development."

1 developments to assure no net loss of ecological functions. To meet this requirement, the
2 County chose to apply buffers to all critical areas, marine shorelines and freshwater
3 shorelines, in compliance with WAC 173-26-221.¹⁵³ As the County states, it has the
4 discretion to protect ecological functions “through a variety of measures including . . .
5 setbacks and buffer standards . . . and a substantial degree of discretion is afforded to the
6 local jurisdiction” in establishing buffers.¹⁵⁴ **The Board finds** OSF has not carried its burden
7 of proof demonstrating the County is non-compliant with WAC 173-26-221(2) in regards to
8 the application of buffers to critical freshwater habitats including larger lakes or streams, or
9 the nearshore marine area.
10

11 *Vegetation Conservation*

12 OSF also takes issue with the SMP’s vegetation conservation regulations. However,
13 that concern was not argued in OSF’s Prehearing Brief other than to include the following
14 statement:
15

16 The OSF Petitioners’ contentions are three-fold: (1) imposition of generic
17 buffers or vegetation protection area set asides are “default” regulatory
18 devices which are illegal under SMA balancing policies and priorities; (2) they
19 violated WAC 173-27-185¹⁵⁵

20 Notwithstanding OSF’s use of conclusory statements in lieu of legal argument, the Board
21 references the following portions of WAC 173-26-221(5)(b) which clearly require
22 jurisdictions to address vegetation conservation:
23

24 The intent of vegetation conservation is to protect and restore the ecological
25 functions and ecosystem-wide processes performed by vegetation along
26 shorelines. Vegetation conservation should also be undertaken to protect
27 human safety and property, to increase the stability of river banks and

28 ¹⁵³ SMP Article 4.1.A “The provisions of this Program shall apply to all shorelines of the state in unincorporated
29 Jefferson County including all **freshwater and saltwater shorelines**, shorelines of statewide significance and
30 all shorelands as defined in Article 2 and RCW 90.58.030. These areas are collectively referred to herein as
31 ‘shorelines’”. See *also* SMP Article 6.1.D.5 Regulations – Critical Areas and Shoreline Buffers for Marine
32 Shores. **Standard Buffer:** The standard buffer shall be measured landward in a horizontal direction
perpendicular to the ordinary high water mark (OHWM) of the shoreline water body, and is a three dimensional
space that includes the airspace above, as follows: i. **Marine shores.** A minimum buffer of 150 feet shall be
maintained in all shoreline environments. See *also* SMP Article 7 at 7.19-20 and Article 8 at 8-31.

¹⁵⁴ Jefferson County Prehearing Brief at 20.

¹⁵⁵ OSF Brief, at 22.

1 coastal bluffs, to reduce the need for structural shoreline stabilization
2 measures, to improve the visual and aesthetic qualities of the shoreline, to
3 protect plant and animal species and their habitats, and to enhance shoreline
4 uses.

5 Master programs shall include: Planning provisions that address vegetation
6 conservation and restoration, and regulatory provisions that address
7 conservation of vegetation; as necessary to assure no net loss of shoreline
8 ecological functions and ecosystem-wide processes, to avoid adverse
9 impacts to soil hydrology, and to reduce the hazard of slope failures or
10 accelerated erosion.

11 Local governments should address ecological functions and ecosystem-wide
12 processes provided by vegetation as described in WAC 173-26-201 (3)(d)(i).

13 Local governments may implement these objectives through a variety of
14 measures, where consistent with Shoreline Management Act policy, including
15 clearing and grading regulations, setback and buffer standards, critical area
16 regulations, conditional use requirements for specific uses or areas,
17 mitigation requirements, incentives and nonregulatory programs.

18 **The Board finds** OSF has not carried its burden of proof demonstrating the County is non-
19 compliant with WAC 173-26-221(2) in regards to vegetation conservation.

20 *Science Flawed*

21 OSF generally complains the County selectively chose scientific evidence to justify its
22 100- and 150-foot buffers¹⁵⁶ and that “agency personnel had a narrow perspective of
23 ‘protecting’ the environment” which led policy-makers to believe they had to factor in
24 “science alone without regard to statutory, social, legal, constitutional and economic
25 considerations.”¹⁵⁷ OFS then states “mere citation to scientific studies is not enough; there
26 must be actual analysis and application to local circumstances.”¹⁵⁸ The Board does not find
27 OSF’s conclusory statements persuasive in the absence of case citations/legal argument
28 explaining how the County failed to meet any of the statutes or rules cited in General Issue
29
30
31
32

¹⁵⁶ OSF Brief at 25.

¹⁵⁷ *Id.* at 26.

¹⁵⁸ *Id.* at 27.

1 3 (OSF Issue No. 6) regarding applying scientific information to establish buffers or
2 vegetation conservation.

3 On the contrary, the Board found the SMP, the SI, and the CIA replete with scientific
4 evidence demonstrating how the County met legal requirements to establish buffers and
5 address vegetation conservation. Specifically, WAC 173-26-201(3)(c) requires local
6 jurisdictions to inventory their shoreline conditions and collect information on, among other
7 things, shoreline and land use patterns, aquatic and terrestrial wildlife habitats, altered and
8 degraded areas and sites among many other requirements. This information educated the
9 County about cumulative impacts from development allowing it to design vegetation
10 conservation methods ensuring protection of ecological functions.¹⁵⁹

11
12 In this case, Jefferson County's SI compares buffer information from other
13 jurisdictions to inform policy-makers of methods other jurisdictions use to apply scientific
14 data in Washington State. The Inventory also cites a decision by the Central Puget Sound
15 Growth Management Hearings Board upholding a 150-foot marine shore buffer. Next, the
16 Inventory cites various studies regarding buffer sizes including buffers up to 300-450 feet for
17 marine shorelines depending on certain factors, 288-foot buffers for wildlife habitat
18 requirements, and the effectiveness of buffers for water quality when they vary from 50 feet
19 to 300 feet.¹⁶⁰ Similarly, the Cumulative Impact Analysis provides the County with
20 information about the effects of development impacts to its shorelines over time. The
21 analysis documents current conditions, likely future development and recommends actions
22 required in RCW 90.58 to ensure "no net loss of ecological functions and protection of other
23 shoreline functions."¹⁶¹

24 OSF's skeletal arguments about a "justification for buffers chosen,"¹⁶² or "ignoring
25 reports which supported reasonably smaller buffers,"¹⁶³ or "mere citation to scientific studies
26
27
28

29
30 ¹⁵⁹ WAC 173-26-201(3) Steps in preparing and amending a master program. See specifically WAC 173-26-
31 201(3)(d)(iii) Addressing cumulative impacts in developing master programs and (viii) Vegetation
32 conservation.

¹⁶⁰ *Id.* at 5-7.

¹⁶¹ OFS Ex. 350 and ECY 000082, Jefferson County -- Shoreline Master Program Update -- *Cumulative
Impacts Analysis* (CIA) (February 2010) at 3.

¹⁶² OFS Brief at 28.

¹⁶³ *Id.* at 29.

1 is not enough: there must be actual analysis and application to the location
2 circumstances”¹⁶⁴, are not substantiated with legal analysis showing how the County
3 violated statute or administrative code. Rather, the Board finds the County’s scientific
4 analysis extensive and intensive as it assembled over 600 scientific reports, analyzed
5 impacts of various policies and finally adopted an SMP which accommodates a variety of
6 shoreline uses and provides exemptions and conditional uses for landowners and
7 businesses.¹⁶⁵ Specifically, SI Chapter 6 cites twenty pages of scientific articles which were
8 discussed publicly and reviewed and approved by Ecology to satisfy the inventory
9 requirements in WAC 173-26.¹⁶⁶ SMP Article 6 allows buffer reductions, averaging and
10 alternative protections via stewardship plans thus allowing the County flexibility when
11 assisting shoreline property owners to develop their land.¹⁶⁷
12

13 *Nexus and Proportionality*

14 As the Board stated in its Second Amended Prehearing Order, the Board lacks
15 jurisdiction to address constitutional issues and will not address OSF’s claims regarding
16 nexus, proportionality, and reasonable necessity limits on government.
17

18 For General Issue 3, OSF has not met its burden to establish the County failed to
19 meet requirements in the SMA or Guidelines regarding excessive buffers, vegetation
20 conservation, or flawed science.
21

22 **For General Issue 3, the Board finds and concludes OSF has not carried its**
23 **burden of proof demonstrating the County is non-compliant with WAC 173-26-221(2).**
24

25 **General Issue No. 4**

26 Whether incorporation of the Jefferson County Critical Areas Ordinance (“CAO”) into the
27 SMP by reference is illegal? (Discussing OSF Issue No. 9 in Second Prehearing Order)
28

29 ¹⁶⁴ *Id.* at 27.

30 ¹⁶⁵ OSF Ex. 124 and ECY004177, Ch. 6, *Jefferson County Final Shoreline Inventory and Characterization*
31 *Report (SI) – Revised November 2008*; and OFS Ex. 350 and ECY 000082, Jefferson County -- Shoreline
32 Master Program Update -- *Cumulative Impacts Analysis (CIA)* (February 2010). See also Article 6 from the
SMP as adopted by Ord. 07-2126-13 for a discussion of policies governing critical areas and vegetation
conservation.

¹⁶⁶ OSF Ex. 124 and ECY003927, *Jefferson County Final Shoreline Inventory and Characterization Report (SI)*
– *Revised November 2008* at Ch. 6.

¹⁶⁷ SMP Article 6 – General Policies & Regulations at 6-6.

1 9. Whether the SMP's incorporation by reference of provisions of Jefferson
2 County's Critical Areas Ordinance, and the resultant use of Growth Management Act
3 standards found in the CAO in lieu of Shoreline Management Act policies regulating
4 development and uses in or near designated critical areas within shoreline areas, is
5 outside of the authority granted by the SMA?

6 **Applicable Laws**

7 OSF's Issue statement lacks specific statutory citations, but asserts incorporation of
8 the CAO into the County's SMP was "illegal". Ecology elected to reply to OSF's arguments
9 and OSF included argument of alleged statutory and rule violation in their prehearing brief
10 regarding General Issue 4 (OSF Issue 9). Consequently, the Board will consider two legal
11 citations debated by the parties:

- 12 • WAC 365-190-080
- 13 • WAC 365-190-130
- 14 • RCW 36.70A.030
- 15 • RCW 36.70A.060
- 16 • RCW 36.70A.480(5)
- 17 • RCW 90.58.020

18 **Position of the Parties**

19 OSF argues incorporating the CAO into the SMP violates the SMA. It states Ecology
20 has no authority to approve a CAO but that by approving the SMP by default it approved the
21 CAO.¹⁶⁸ In *KAPO*,¹⁶⁹ OSF argues the court held that only one system may be in effect at
22 any one time. Allowing the "blanket incorporation" of the CAO into the SMP ignores "the law"
23 by failing to maintain two separate regulatory systems. Incorporating 150-foot buffers from
24 the CAO into the SMP, without analyzing consistency with the SMA, is "clear legal error."¹⁷⁰
25 The County ignored Ecology's 2010 regulations in WAC 365-190 and instead used
26 outdated 2009 CAO requirements.¹⁷¹ Lastly, OSF contends the County violated RCW
27 36.70A.480(5) and WAC 365-190-030 when it incorporated CAOs into the SMP¹⁷² because
28
29
30

31 ¹⁶⁸ OSF Prehearing Brief at 27.

32 ¹⁶⁹ *Kitsap Alliance of Property Owners v. CPSGMHB*, 152 Wn. App. 190, 217 P.3d 365 (2009) (*KAPO I*).

¹⁷⁰ *Id.* At 28.

¹⁷¹ *Id.* At 29.

¹⁷² *Id.* at 32.

1 (1) imposing a CAO 150-foot buffer on Jefferson County's shorelines is illegal because the
2 County has no authority to implement the Endangered Species Act, (2) imposing the 150-
3 foot buffer because the shorelines could be ESA species habitat is illegal and not supported
4 by the record, (3) the County has not established that all marine areas and associated
5 uplands are critical for fish and wildlife to warrant an "over-inclusive critical area buffer."¹⁷³

6 Respondent Ecology explains legislative actions and court decisions have clarified
7 the role of CAOs in SMPs. Briefly stated, the 2010 Legislature amended RCW 36.70A.480
8 to explain that CAOs, adopted under GMA, apply in a shoreline jurisdiction until Ecology
9 approves a "comprehensive update under the SMA Guidelines, at which time the critical
10 areas in shorelines will be regulated exclusively under the SMA."¹⁷⁴ Incorporation is allowed
11 by Ecology as long as the CAO meets the No Net Loss requirement in RCW 36.70A.480
12 (4).¹⁷⁵ Ecology states it does not review and approve CAOs for compliance with the GMA.
13 Rather, Ecology's role is to ensure a CAO provides a "level of protection to critical areas
14 located within the shorelines of the state that assures no net loss of shoreline ecological
15 functions . . . pursuant to RCW 90.58.060."¹⁷⁶ As outlined in *Kitsap Alliance of Property*
16 *Owners v. CPSGMHB*, incorporating the CAO into the SMP "perfects the transfer of the
17 protection of critical areas [in the shoreline] from the GMA to the SMA."¹⁷⁷ Next, Ecology
18 explains the SMP buffers are not in conflict with the CAO buffers because the SMP does not
19 rely solely on CAO buffers. Instead, the SMP 150-foot buffer was independently
20
21
22

23 ¹⁷³ *Id.* at 31.

24 ¹⁷⁴ Ecology Brief at 21.

25 ¹⁷⁵ RCW 36.70A.480 (4) "Shoreline master programs shall provide a level of protection to critical areas located
26 within shorelines of the state that assures no net loss of shoreline ecological functions necessary to sustain
27 shoreline natural resources as defined by department of ecology guidelines adopted pursuant to RCW
28 90.58.060."

29 ¹⁷⁶ Ecology Brief at 23.

30 ¹⁷⁷ *Id.* at 22-23 See also Ecology's n. 124 describing the differences between KAPO I and KAPO II: IR
31 ECY008920; *Lake Burien Neighborhood v. City of Burien*, CPSGMHB No. 13-3-0012, at 11 (Jun. 16, 2014); IR
32 ECY007296-97 (SMP Art. 6.1.D.). **OSF is incorrect in stating that this approach is inconsistent with the
court's decision in *Kitsap Alliance of Property Owners v. CPSGMHB*, 160 Wn. App. 250, 255 P.3d 969
(2011) (KAPO II).** In *KAPO II*, the court upheld the retroactivity of the amendment to RCW 36.70A.480,
clarifying that the GMA was to regulate critical areas in shorelines until the SMP is updated. More likely OSF
meant to refer to *KAPO I* in which the court stated that "only one plan—the SMA plan—can be in effect at one
time." *Id.* at 198. The court was referring not to incorporation of CAO provisions into a SMP, but rather the
regulation of shoreline critical areas under the SMA versus the GMA. The SMP is consistent with *KAPO I* as it
regulates critical areas solely under the SMA, in part by incorporating the CAO into the SMP and also by
including supplemental provisions in the SMP.

1 established by the County based on a review of science and existing conditions in the
2 County.¹⁷⁸ In addition, some alterations to the buffer requirement may be made for water-
3 dependent and water-related structures.¹⁷⁹ Ecology notes that, to the extent OSF makes a
4 collateral attack on the CAO, the deadline for such a challenge is well past.¹⁸⁰

6 Discussion, Analysis, and Board Conclusion

7 A jurisdiction's CAO applies to critical areas within SMA jurisdiction until DOE either
8 approves a comprehensive SMP update consistent with the Guidelines, or a segment
9 (limited) SMP amendment specifically addressing critical areas. Following DOE approval of
10 the SMP it alone provides critical area protection within shoreline jurisdiction. Jefferson
11 County's decision to incorporate its CAO into the SMP was proper and appropriate. WAC
12 173-26-191(2)(b) addresses that option for meeting SMA requirements:

14 **Including other documents in a master program by reference.**

15 Shoreline master program provisions sometimes address similar issues as
16 other comprehensive plan elements and development regulations, such as
17 the zoning code and **critical area ordinance**. For the purposes of
18 completeness and consistency, **local governments may include other**
19 **locally adopted policies and regulations within their master programs.**
20 **For example, a local government may include its critical area ordinance**
21 **in the master program to provide for compliance with the requirements**
22 **of RCW 90.58.090(4), provided the critical area ordinance is also**
23 **consistent with this chapter.** This can ensure that local master programs
24 are consistent with other regulations. (emphasis added)

25 Contrary to OSF's argument, Ecology did not **approve** the County's CAO when it
26 approved the SMP which in turn had incorporated the CAO. Instead, DOE simply assured
27 through its review that the incorporated CAO met the "no net loss of ecological functions"
28 requirements for SMPs prescribed in RCW 90.58.060 and as referenced in RCW
29 36.70A.480(4).

30
31
32

¹⁷⁸ *Id.* at 23.

¹⁷⁹ *Id.* at 24 and IR ECY 007389 (SMP Article 8.8.D.2).

¹⁸⁰ *Id.* at 25.

1 For General Issue 4, OSF has not met its burden to establish the County failed to
2 meet requirements in the SMA or Guidelines regarding incorporation of the County's Critical
3 Area Ordinance into the SMP.

4 **For General Issue 4, the Board finds and concludes OSF has not carried its**
5 **burden of proof to establish any violation of the SMA, the applicable guidelines or the**
6 **applicable sections of the GMA.**
7

8 **General Issue No. 5**

9 Whether the SMP illegally requires mandatory restoration as a condition of approval of a
10 shoreline permit application? (Discussing OSF Issue No. 11 in the Second Prehearing
11 Order)

12
13 11. Does the SMP impermissibly require restoration as a cost or condition of
14 approving shoreline developments or uses (e.g. Art. 1(3)(G)(6), Art. 3(1)(B)(30(4)) in
15 conflict with RCW 90.58.020 and/or WAC 173-26-186(4) and (8)(C)?

16 **Applicable Laws**

- 17 • RCW 90.58.020
- 18 • WAC 173-26-186

19 **Position of the Parties**

20
21 OSF contends the County over-emphasizes the need to restore ecosystem functions
22 at the expense of property owners. The SMP, in OSF's opinion, violates the balancing
23 requirements in the SMA (90.58.020) and the governing principles in the administrative
24 codes because the SMP contains so many references to "restore or restoration."¹⁸¹ OSF
25 argues the SMP also imposes "illegal hurdles on shoreline permitting" in violation of private
26 property rights and preferred uses under the SMA.¹⁸²
27

28 Respondent Ecology states OSF relies on an overly simplistic view of the SMP. The
29 number of times the words "restore or restoration" are used does not warrant a finding of
30 non-compliance. Nor do the goals, in alphabetical order, deserve a finding of non-
31 compliance. Ecology explains SMA guidelines require jurisdictions to identify "policies and
32

¹⁸¹ OSF Brief at 32. "This is made abundantly clear by searching the enactment for the terms "restore" and "restoration." There are 141 hits throughout the text!"

¹⁸² OSF Brief at 33.

1 programs that contribute to the restoration of impaired ecological functions.”¹⁸³ Finally,
2 Ecology explains “there is a regulatory backstop to ensure that the County implements
3 these requirements so as to “not unconstitutionally infringe on private property rights or
4 result in an unconstitutional taking of private property.”¹⁸⁴
5

6 **Discussion, Analysis, and Board Conclusion**

7 Substituting its own determination of what is “balanced” or “permissible” for that of the
8 Legislature, Ecology, and the County Commission does not make OSF’s arguments
9 compelling or suffice to demonstrate violations of RCW 90.58.020 or WAC 173-26-186. To
10 the contrary, one of the Guideline sections OSF asserts was violated **requires** the County to
11 include restoration and enhancement goals:
12

13 For counties and cities containing any shorelines with impaired ecological
14 functions, master programs **shall include** goals and policies that provide for
15 restoration of such impaired ecological functions. These master program
16 provisions **shall identify** existing policies and programs that contribute to
17 planned restoration goals and identify any additional policies and programs
18 that local government will implement to achieve its goals. WAC 173-26-
186(8)(c)

19 The County complied in SMP Article 3.6 by stating its goals are to “reestablish, rehabilitate
20 and improve impaired shoreline ecological functions, values and/or processes.”¹⁸⁵ This is
21 not a violation of law, rather it implements the law. The number of times the SMP contains
22 the words “restore” or “restoration” fails to constitute a violation of the law.
23

24 For General Issue 5, OSF has not met its burden to establish the County failed to
25 meet requirements in the SMA or Guidelines regarding restoration of ecological functions.

26 **For General Issue 5, the Board finds and concludes OSF failed to carry its**
27 **burden of proof to show the County violated RCW 90.58.020 or WAC 173-26-186.**
28

29 **General Issue No. 6**

30 Whether the SMP impermissibly over designates shorelines as “natural” and “conservancy?”
31 (Discussing OSF Issue No. 12 in Second Prehearing Order)
32

¹⁸³ Ecology Brief at 26.

¹⁸⁴ IR ECY007227 (SMP Art. 1.3.D).

¹⁸⁵ SMP, Article 3 at 3-4.

12. Whether the SMP over-designates shorelines and lands as “Natural” and “Conservancy” in violation of WAC 173-26-211(3)(a), WAC 173-26-191(1)(e), WAC 173-26-211(5)(a)(1), WAC 173-26-211(5)(a)(iii), and WAC 173-26-211(5)(b)(1)

Applicable Laws¹⁸⁶

- WAC 173-26-211

Position of the Parties

OSF argues the County over-designated Natural Shoreline Designation to include 41% of the County’s shorelines. OSF states the SMA Guidelines require designation to be based on existing land use patterns and other criteria from WAC 173-26-211(2)(a) and the designations must be consistent with comprehensive land use plans as stated in WAC 173-26-211(3). Respondent Jefferson County explains it developed appropriate criteria for each environmental designation using the SMA Guidelines and criteria from WAC 173-26-211(5)(a) for “Natural” areas.

Discussion, Analysis, and Board Conclusion

OSF does not provide legal argument demonstrating how the County violated the processes and criteria in the SMA Guidelines. OSF cites no authority to bolster its claim that the County “over-designated” natural areas. The SMP criteria used to designate shorelines are from WAC 173-26-211 and are required to be consistent with the County’s comprehensive plan:

2. Shoreline Environment Designations – Purpose and Criteria

A. Shoreline environment designations have been developed as a part of this Program **in accordance with WAC 173-26-211**. The designations provide a systematic, rational, and equitable basis upon which to guide and regulate use and development within specific shoreline planning areas.¹⁸⁷

B. Shoreline environment designations are based on the following general factors, not listed in order of priority. . .

3. Existing and planned development patterns, including County Comprehensive Plan designations; and

¹⁸⁶ For lack of legal argument, WAC 173-26-191 is considered abandoned.

¹⁸⁷ SMP Article 4 at 4-2.

1 4. The County Comprehensive Plan goals for shorelines¹⁸⁸

2 In reviewing SMP Article 4, the Board determines the County's SMP meets SMA Guideline
3 requirements. **For General Issue 6, the Board finds and concludes OSF failed to make**
4 **a compelling argument that natural or conservancy areas are over designated and**
5 **failed to carry its burden of proof to show the County violated WAC 173-26-211.**
6

7
8 **General Issue No. 7**

9 Whether the SMP was adopted under illegal procedures or process? (Addressing OSF
10 Issue No. 10 Second Prehearing Order)

11 10. Whether Ecology and the County violated mandated processes for approval of a
12 new SMP including but not limited to (a) the quality and timing of its Final Cumulative
13 Impact Assessment and SI and (b) the requirement to foster meaningful comment
14 and reasonably consider public comment?

15 **Applicable Laws**

16 None cited by OSF.
17

18
19 **Position of the Parties**

20 OSF Petitioners defer to the arguments in Hood Canal's Issue 2 on procedural error
21 issues. However, OSF makes several claims regarding staff comments and attitudes during
22 the SMP adoption process and about Ecology staff playing an "inappropriate role" to obtain
23 a "staff version" of the SMP and staff opinions. OSF accuses Ecology of providing policy
24 directives rather than technical assistance.¹⁸⁹ Jefferson County does not reply to the claims
25 about staff. Respondent Ecology states OSF complaints are "not within the scope of the
26 legal issues identified for appeal, nor is it an accurate description of the update process."¹⁹⁰
27
28

29 **Discussion, Analysis, and Board Conclusion**

30 OSF claims about staff attitudes or comments are not within the scope of the Board's
31 jurisdiction. Neither has OSF made any compelling legal arguments showing how staff work
32

¹⁸⁸ *Id.* at 4-2.

¹⁸⁹ OSF Prehearing Brief at 35-36.

¹⁹⁰ Ecology Brief at 24.

1 or attitudes violated any statute or administrative code. As for the public involvement and
2 comment process conducted by Respondents, the Board directs the reader to Hood Canal
3 Issue 2.

4 **For OSF General Issue 7, the Board finds and concludes OSF failed to carry its**
5 **burden of proof to establish any SMA violation.**
6

7 **General Issue No. 8**

8 Is the SMP internally inconsistent and inconsistent with the Jefferson County
9 Comprehensive Plan? (*Discussing OSF Issue No. 2 in Second Prehearing Order*)
10

11 2. Did Ordinance No. 07-1216-3 fail to comply with SMA policies RCW 90.58.020,
12 .030, .065, .090, .100(6), .130, .250, .270, .340, .620, and/or .710; the State
13 Guidelines (WAC Chapter 173-26), the Growth Management Act goals and
14 requirements, RCW 36.70A.480(3)(a) and (5) including internal consistency and
15 consistency with the Comprehensive Plan because the SMP unduly emphasized
16 aesthetics; did not balance reasonable uses; failed to address beneficial uses; failed
to balance SMA values; failed to protect property rights; etc.?

17 **Applicable Laws**¹⁹¹

- 18 • RCW 36.70A.070
- 19 • RCW 36.70A.480
- 20 • RCW 90.58.190(2)(b)
- 21
- 22

23 **Position of the Parties, Discussion, Analysis, and Board Conclusion**

24 OSF's General Issue 8 alleges the SMP violates the SMA and the Guidelines, but
25 focuses its argument solely on what are described as "inconsistencies." OSF correctly
26 observes internal inconsistency is required and that Board review includes jurisdiction to
27 consider such claims pursuant to the provisions of RCW 36.70A.070 (preamble) and RCW
28 36.70A.040(4). OSF cites RCW 90.58.190(2)(b) and RCW 36.70A.480(3):
29

30 RCW 90.58.190(2)(b) If the appeal to the growth management hearings
31 board concerns shorelines, the growth management hearings board shall
review the proposed master program or amendment solely for compliance
32

¹⁹¹ For lack of legal argument, the following are considered abandoned: RCW 90.58.020; RCW 90.58.030;
RCW 90.58.065; RCW 90.58.090; RCW 90.58.100(6); RCW 90.58.130; RCW 90.58.250; RCW 90.58.270;
RCW 90.58.340; RCW 90.58.620, RCW 90.58.710(sic); and WAC Chapter 173-26.

1 with the requirements of this chapter, the policy of RCW 90.58.020 and the
2 applicable guidelines, the internal consistency provisions of RCW
3 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter 43.21C
4 RCW as it relates to the adoption of master programs and amendments
5 under chapter 90.58 RCW.

6 RCW 36.70A.480(3)(a) The policies, goals, and provisions of chapter 90.58
7 RCW and applicable guidelines shall be the sole basis for determining
8 compliance of a shoreline master program with this chapter except as the
9 shoreline master program is required to comply with the internal consistency
10 provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105.

11 Two of the statutes referenced above, RCW 35.63.125 and 35A.63.105, are
12 applicable to cities and towns not planning under RCW 36.70A.040. RCW 36.70A.040(4)
13 applies solely to counties which chose to conform to GMA requirements. Jefferson County is
14 not one of those counties; it was **required** to conform.¹⁹² Consequently, the Board's
15 consideration of OSF's inconsistency claims are to be reviewed pursuant to RCW
16 36.70A.070 (preamble) and RCW 36.70A.480(1):

17 The comprehensive plan of a county or city that is required or chooses to
18 plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive
19 text covering objectives, principles, and standards used to develop the
20 comprehensive plan. **The plan shall be an internally consistent document**
21 **and all elements shall be consistent with the future land use map.** A
22 comprehensive plan shall be adopted and amended with public participation
23 as provided in RCW 36.70A.140. (emphasis added)

24 RCW 36.70A.480(1) For shorelines of the state, the goals and policies of the
25 shoreline management act as set forth in RCW 90.58.020 are added as one
26 of the goals of this chapter as set forth in RCW 36.70A.020 without creating
27 an order of priority among the fourteen goals. **The goals and policies of a**
28 **shoreline master program for a county or city approved under chapter**
29 **90.58 RCW shall be considered an element of the county or city's**
30 **comprehensive plan.** All other portions of the shoreline master program for
31 a county or city adopted under chapter 90.58 RCW, including use
32 regulations, shall be considered a part of the county or city's development
regulations. (emphasis added)

¹⁹² RCW 36.70A.040.

OSF reads those statutes to mean “. . . that a SMP must be consistent with Comprehensive Plan policies.”¹⁹³ However, OSF’s interpretation leaves out a significant qualifier: it is the goals and policies of the SMP that must be consistent with the comprehensive plan goals policies under RCW 36.70A.070. OSF completes that quoted sentence with the statement “. . . and its own [the SMP] provisions must be internally consistent.” That statement is accurate if, and only if, the word “provisions” refers to the SMP’s policies. Consistency between comprehensive plan policies (including SMP policies) and a jurisdiction’s development regulations is not a requirement covered by RCW 36.70A.070’s preamble.¹⁹⁴ In this case it is necessary to show that no goal or policy of the challenged SMA precludes the achievement of a comprehensive plan goal or policy or vice versa.¹⁹⁵

Further, based on the alleged violations in OSF’s General Issue 8 and the briefing submitted, the inconsistency claims raised are within the Board’s jurisdiction only when they are raised in relationship to shorelines, not shorelines of statewide significance. RCW 90.58.190(2)(b) and (c).¹⁹⁶ The Board examined OSF’s specific examples of alleged inconsistencies as follows:

¹⁹³ OSF Brief, p. 37.

¹⁹⁴ The goals and policies of a SMP are considered an element of the County’s comprehensive plan. Other portions of an SMP are considered to be development regulations. RCW 36.70A.480(1). *Weyerhaeuser v. Thurston County*, GMHB Case No. 0-2-0020c, AFDO, p. 15 “RCW 36.70A.070 requires the internal consistency of comprehensive plan policies, not consistency between a comprehensive plan and development regulations. An RCW 36.70A.070 (Preamble) claim cannot rest on inconsistency with the County’s “critical area regulations”. AFDO 6/17/11.

¹⁹⁵ Under the GMA, a comprehensive plan must be “an **internally consistent document** and all elements shall be consistent with the future land use map.” RCW 36.70A.070 (emphasis added). This requirement means that differing parts of the comprehensive plan “must fit together so that no one feature precludes the achievement of any other.” WAC 365-196-500(1). *Brinnon Grp. v. Jefferson County*, 159 Wn. App. 446, 476-477 (Wash. Ct. App. 2011).

WAC 365-196-500. “Internal consistency. (1) Comprehensive plans must be internally consistent. This requirement means that differing parts of the comprehensive plan must fit together so that no one feature precludes the achievement of any other.” See also *Brinnon Group v. Jefferson County*, GMHB Case No. 08-2-0014, FDO, at 20 (Sept. 15, 2008). “Consistency means that no feature of the plan or regulation is incompatible with any other feature of the plan or regulation; no feature of one plan may preclude achievement of any other feature of that plan or any other plan.”

¹⁹⁶ RCW 90.58.190(2)(b). “If the appeal to the growth management hearings board concerns shorelines, the growth management hearings board shall review the proposed master program or amendment solely for compliance with the requirements of this chapter, the policy of RCW 90.58.020 and the applicable guidelines, the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58

- OSF states the SMP criteria are “inconsistent with the SMA, and the State Guidelines.”¹⁹⁷
- The County and Ecology use “different definitions of NNL” and “none of these definitions are consistent with SMA balancing policies found in RCW 90.58.020.”¹⁹⁸
- “The Plan has strong policies to protect existing lots of record and property rights.” “The new SMP’s treatment of nonconforming uses and existing lots of record is inconsistent with the Comprehensive Plan in some major respects.”¹⁹⁹
- “The New SMP has a strong prejudice against any commercial uses in SMA regulated areas. However, the Comprehensive Plan provides for policies to protect legally existing uses, home based businesses, and cottage industries . . .” citing the plan provisions for preservation of rural character and promotion of rural lifestyle, including the opportunity to live and work in rural areas.²⁰⁰
- The Comprehensive Plan seeks to preserve marine trades, agriculture, and natural resource jobs. “Yet, the New SMP does nothing to promote these traditional industries.”²⁰¹
- “The CP encourages affordable housing.” In contrast, OSF states the SMP’s use of buffers, and vegetation “set asides” conflicts with that policy.²⁰²
- The CP includes a goal to improve the climate for economic development, including the recruitment of industry, retention of existing businesses and

RCW.”

RCW 90.58.190(2)(c). “If the appeal to the growth management hearings board concerns a shoreline of statewide significance, the board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines that the decision of the department is noncompliant with the policy of RCW 90.58.020 or the applicable guidelines, or ch. 43.21C RCW as it relates to the adoption of master programs and amendments under this chapter.”

¹⁹⁷ OSF Brief at 15 and 18.

¹⁹⁸ OSF Brief at 18.

¹⁹⁹ OSF Brief at 37.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

1 promoting tourism. On the other hand, OSF states the SMP “unduly restricts
2 construction of facilities which promote access to the waters of the state ...”²⁰³

- 3 • The new SMP expands restrictive shoreline designations and, when considered in
4 relationship to the Use Matrix, new commercial development will be precluded.²⁰⁴

5 The first two allegations set forth above do not raise internal inconsistency arguments
6 under RCW 36.70A.070 (preamble). Neither inconsistency “with the SMA, and the State
7 Guidelines” nor the definition of NNL constitute allegations regarding goals or policies. The
8 remaining allegations could possibly raise internal inconsistencies, but OSF falls far short of
9 establishing that any “feature precludes the achievement of any other”²⁰⁵ when it fails to
10 cite any mutually exclusive provisions. Mere conclusory statements alleging inconsistency
11 without substantial evidence, are insufficient to meet a petitioner’s burden. Rather, it is
12 imperative to show how a specific goal or policy is thwarted by some other specific goal(s)
13 or policy(ies). OSF has not met that standard. **For General Issue 8, the Board finds and**
14 **concludes OSF has failed to meet its burden of proof to establish any internal**
15 **inconsistencies under RCW 36.70A.070 or RCW 36.70A.480.**
16
17

18 **B. Citizen Alliance for Property Rights (CAPR)**

19 **First General Issue**

20 Respondents failed to adequately “[u]tilize a systematic interdisciplinary approach which will
21 insure the integrated use of the natural and social sciences and the environmental design
22 arts” as required by RCW 90.58.020, 100(1) and 100(2), and .620, and WAC 173-26-
23 201(2), 211, 221(2), 231(2), 241(2), (3), and 251(3). The SMA requires that respondents
24 “[c]onduct or support such further research, studies, surveys, and interviews as are deemed
25 necessary.” *Id.* CAPR argues that this was not done and thereby the SMP is flawed by
26 respondents’ failure to: 1. Buttress their regulatory prescriptions by physical and biologic
27 science; and 2. Adequately take into account the social sciences, particularly economics.
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²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Brinnon Grp. v. Jefferson County*, 159 Wn. App. 446, 476-477 (Wash. Ct. App. 2011).

1 **Applicable Laws**²⁰⁶

- 2 • RCW 90.58.020
3 • RCW 90.58.100(1) and (2)
4 • RCW 90.58.620
5 • WAC 173-26-201(2)
6 • WAC 173-26-211
7 • WAC 173-26-221(2)
8 • WAC 173-26-231(2)
9 • WAC 173-26-241(2) and (3)
10 • WAC 173-26-251(3)

11 **Position of the Parties**

12 In its opening brief, CAPR fails to address its Issue 1 alleged violations of WAC 173-
13 26-211, WAC 173-26-221(2), WAC 173-26-231(2), WAC 173-26-241(2) or WAC 173-26-
14 251(3).²⁰⁷ Merely alleging a statute or rule was violated without presenting argument
15 constitutes abandonment of the issue. Allegations of violations of those WAC sections are
16 dismissed. Additionally, CAPR's Issue 1 argument alleges violations of WAC 173-26-
17 186(8)(a),²⁰⁸ a WAC not identified within CAPR's First General Issue, including the
18 "[p]articular issues to be argued under First General Issue".²⁰⁹ WAC 242-03-210(2)(c)
19 requires a petitioner to include in a Petition for Review "[a] detailed statement of the issues
20 presented for resolution by the board that **specifies the provision(s) of the act or other**
21 **statute allegedly being violated** and, if applicable, the provision(s) of the document that is
22 being appealed."²¹⁰ (Emphasis supplied.) The alleged violation of WAC 173-26-186(8)(a)
23 will not be considered.
24
25
26

27 ²⁰⁶ For lack of legal argument, the following are considered abandoned: WAC 173-26-211, WAC 173-26-
28 221(2), WAC 173-26-231(2) and WAC 173-26-251(3).

29 ²⁰⁷ The section of CAPR's opening brief addressing Issue 1 concludes with: "Upon the arguments here
30 advanced, the SMP violates RCW 90.58.020, 100(1) and 100(2), and .620, and WAC 173-26-201(2), 211,
31 221(2), 231(2), 241(2), (3), and 251(3)." CAPR Brief, p. 15. Yet the argument in the brief fails to reference
32 WAC 173-26-211, WAC 173-26-221(2), WAC 173-26-231(2), WAC 173-26-241(2) or WAC 173-26-251(3).

²⁰⁸ CAPR Brief, p. 13.

²⁰⁹ See Prehearing Order and Order Granting Settlement Extension, May 23, 2014, p. 24-25.

²¹⁰ RCW 36.70A.290(1): The board shall not issue advisory opinions on issues not presented to the board in
the statement of issues, as modified by any prehearing order. *Samson v. City of Bainbridge Island*, Case No.
04-3-0013, p. 5, Order on Motions; *Hood Canal v. Kitsap County*, Case No. 06-3-0012c, FDO, August 28,
2006, p. 25; *Cotton v. Jefferson County*, Case No. 98-2-0017, Amended FDO, April 5, 1999, p. 4.

CAPR's remaining argument related to this issue has two facets: alleged failures to incorporate economic analysis as well as inadequate scientific support for many of the regulatory measures, particularly those affecting residential shoreland property owners.

A. Economic Analysis

CAPR specifically cites RCW 90.58.100(1) and (2), which it notes includes a directive for local government to use economics in crafting SMPs and to include an economic development element in the document.

RCW 90.58.100(1)(a) and (2)(a):

(1) The master programs provided for in this chapter, when adopted or approved by the department shall constitute use regulations for the various shorelines of the state. In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible: (a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts . . . (e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

(2) The master programs shall include, when appropriate, the following: (a) An economic development element for the location and design of industries, projects of statewide significance, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state;

This petitioner complains there is no analysis anywhere in the record addressing the economic impact of "increased buffers ... greater permitting hurdles ... creation of nonconforming uses and structures" on "property values, property insurance rates, opportunities for financing and refinancing, or costs of regulatory compliance."²¹¹ CAPR contends the County failed to either identify or incorporate the social science of economics.²¹² In support of that allegation, CAPR observes the *Bibliography of Scientific and Technical Information Considered* includes no reference to economics, that concerns about economic impacts were raised repeatedly, yet the County only provided "a repetitive

²¹¹ CAPR Brief, p. 6.

²¹² *Id.*, p. 7.

1 collection of patently inadequate responses”²¹³ and, finally, that the County’s “dismissive
2 attitude” was evidenced by its failure to take advantage of the RCW 90.58.620’s allowance
3 for classifying structures, which would be nonconforming under the new SMP as legally
4 conforming.²¹⁴

5 CAPR expresses concern that the SMP regulations’ economic impact on property
6 owners was an issue raised repeatedly to Jefferson County’s Planning Commission and
7 Board of County Commissioners. The record is replete with comments addressing those
8 impacts, including the County’s decision to not authorize categorizing use locations as
9 conforming solely because they were in compliance with applicable regulations when
10 constructed, as allowed by RCW 90.58.620.²¹⁵ As some of the petitioners have noted, the
11 SMA seeks to **balance** accommodation of shoreline use and access with protection of
12 environmental resources. “[U]ses shall be preferred which are consistent with control of
13 pollution and prevention of damage to the natural environment, or are unique to or
14 dependent upon use of the state’s shorelines.”²¹⁶ Thus, for example, single-family
15 residences are a preferred use, but all uses, including preferred ones, also must be
16 regulated so as to protect shoreline natural resources, including “. . . the land and its
17 vegetation and wildlife, and the water of the state and their aquatic life. . . .”²¹⁷

18 As the County points out, it opted to strike the required balance by allowing various
19 uses in specific Shoreline Environment Designations (SEDs) and by authorizing other uses
20 pursuant to the conditional use permit process (CUP). Economic feasibility of regulatory
21 compliance was factored in to many of the County’s goals and regulations through
22 consideration of “feasibility”. For example, “feasible alternative” is defined in part as an
23 alternative that “can be accomplished at a reasonable cost.”²¹⁸ That and similar words and
24 phrases are included throughout the SMP’s goals and regulations. Examples include the
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31 ²¹³ *Id.*, pp. 6, 7.

32 ²¹⁴ *Id.* pp. 8, 9.

²¹⁵ RCW 90.58.620.

²¹⁶ RCW 90.58.020.

²¹⁷ *Id.*

²¹⁸ Article 2, p. 2-16.

1 public access regulations,²¹⁹ flood control structures,²²⁰ provision of parking at marinas, and
2 shoreline armoring.²²¹ Returning to RCW 90.58.620(1), the County had the option to use
3 the provisions of that statute, but was not required to do so.²²² The law is not violated when
4 the jurisdiction chooses not to exercise every option it **could** exercise.

5 6 **B. Lack of Science**

7 CAPR argues the SMP's regulatory framework is unsupported by adequate science.
8 It states the County's CIA and Final SI are incomplete, lacking "field verification, and a
9 thorough analysis of existing conditions," being "based only upon photos and literature."²²³

10 CAPR cites RCW 90.58.100(1)(d) and WAC 173-26-201(3)(c) which provide:

11
12 The master programs provided for in this chapter, when adopted or approved
13 by the department shall constitute use regulations for the various shorelines
14 of the state. In preparing the master programs, and any amendments thereto,
15 the department and local governments shall to the extent feasible: ...

16 (d) Conduct or support such further research, studies, surveys, and
17 interviews as are deemed necessary; RCW 90.58.100(1)(d)

18 Local government shall, at a minimum, and to the extent such information is
19 relevant and reasonably available, collect the following information:

20 (i) Shoreline and adjacent land use patterns and transportation and utility
21 facilities, including the extent of existing structures, impervious surfaces,
22 vegetation, and shoreline modifications in shoreline jurisdiction. Special
23 attention should be paid to identification of ecologically intact blocks of
24 upland vegetation, developed areas with largely intact riparian vegetation,
25 water-oriented uses and related navigation, transportation and utility facilities.
26 WAC 173-26-201(3)(c).

27
28 ²¹⁹ Article 6, p. 6-17.

29 ²²⁰ Article 7, p. 7-22.

30 ²²¹ Article 7, p. 7-30.

31 ²²² RCW 90.58.620. "(1) New or amended master programs approved by the department on or after
32 September 1, 2011, may include provisions authorizing: (a) Residential structures and appurtenant structures
that were legally established and are used for a conforming use, but that do not meet standards for the
following to be considered a conforming structure: Setbacks, buffers, or yards; area; bulk; height; or density;
and (b) Redevelopment, expansion, change with the class of occupancy, or replacement of the residential
structure if it is consistent with the master program, including requirements for no net loss of shoreline
ecological functions."

²²³ CAPR Brief, p. 12.

1 It contends the SI is merely “a list of what is on the shorelines of Jefferson County . . .
2 [and] is not an analysis and consideration of the trade-offs explicit in the Shoreline
3 Management Act’s call to ‘utilize a systematic approach, which will ensure the integrated
4 use of the natural and social sciences”²²⁴ It states the SI lacks sufficient detail
5 regarding actual conditions and instead the SMP “places the burden on property owners ...
6 to assess impacts and identify the shoreline environment.”²²⁵ The CIA is also criticized,
7 CAPR stating it fails to adequately consider the effectiveness of existing regulatory systems
8 and current conditions.²²⁶ CAPR argues the CIA assumes impacts without actually
9 documenting them.
10

11 Finally, it contends there is no science in the record justifying the establishment of
12 150-foot buffers. CAPR observes the prior SMP included 30-foot shoreline setbacks, that
13 the CIA stated the existing shoreline conditions were “good,” and that the County merely
14 cited technical literature but ultimately made a policy decision in adopting 150-foot buffers,
15 one unsupported by the science.²²⁷ Essentially, the argument is that the County just
16 assembled a bibliography of scientific information and then adopted regulations which failed
17 to correlate with the assembled scientific information.²²⁸
18

19 Both Ecology and the County address CAPR’s Issue 1 arguments. Ecology
20 responds, stating that no economic analysis of the type CAPR envisions is required by the
21 SMA or the Guidelines. It cites RCW 90.58.100, which provides that Ecology and local
22 governments. “shall to the extent feasible . . . utilize a systematic interdisciplinary approach,
23 which will ensure the integrated use of the natural and social sciences and the
24 environmental design arts.”²²⁹ It states that statute’s language merely provides the context
25 for a jurisdiction’s planning for water-dependent uses. Rather than requiring economic
26 analysis, as argued by CAPR, Ecology states RCW 90.58.100’s provisions are implemented
27 primarily through the reservation of appropriate shoreline areas for water-dependent and
28
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31 ²²⁴ CAPR Reply Brief, p. 2.

32 ²²⁵ CAPR Brief, p. 13.

²²⁶ *Id.*, p. 13.

²²⁷ *Id.*, p. 15.

²²⁸ CAPR Reply Brief, p. 4.

²²⁹ Ecology Brief, p. 27.

1 water-related uses, citing WAC 173-26-201(2)(d)(i) through (v). The required SI, the CIA,
2 and a “use analysis”, states Ecology, are the methods a local jurisdiction uses to plan for
3 shoreline economic development.²³⁰

4 While Ecology suggests no detailed economic analysis is required, the County
5 asserts the record clearly establishes that it did in fact consider economic impacts on
6 property owners of the shoreline regulations. It states SMP Article 3.2 sets forth goals for
7 economic development. Beyond that, it references the SMP at pages 2-15 and 2-16, where
8 it included feasibility, as well as other factors, when considering whether a proposed action
9 or permit requirement can be accomplished at a reasonable cost.²³¹ The County states
10 consideration of economics is also reflected in its description of shoreline areas for
11 commercial, industrial, and residential development, including higher-density residential.
12 Further recognition of economics is illustrated by the SMP’s allowance of various uses,
13 including residential, through the use of conditional use permits (CUPs) to accommodate
14 site-specific use allowance.²³²

15
16
17 The County disputes CAPR’s assertion of inadequate science. It contends there is no
18 SMA requirement to verify its SI by visually inspecting/verifying all of its shorelines and,
19 beyond that, it observes CAPR failed to point to any specific property or areas which were
20 mischaracterized in the SI. The County references what it describes as “detailed analyses”
21 of its shorelines contained in the *Ecosystem Characterization and Ecosystem-Wide*
22 *Processes, Reach Inventory and Analyses*, and *Final Inventory and Characterization* map
23 folio.²³³

24 25 26 **Discussion, Analysis and Board Conclusions**

27 CAPR alleges a violation of RCW 90.58.620. The Board notes that particular statute
28 merely provides an option to local governments:

29
30 New or amended master programs approved by the department on or after
31 September 1, 2011, **may include provisions** authorizing: (a) Residential

32 ²³⁰ *Id.*, pp. 28, 29

²³¹ Jefferson County Brief, p. 28.

²³² *Id.* p. 29.

²³³ *Id.* p. 30.

1 structures and appurtenant structures that were legally established and are
2 used for a conforming use, but that do not meet standards for the following to
3 be considered a conforming structure: Setbacks, buffers, or yards; area; bulk;
4 height; or density (emphasis added)

5 **The Board finds** the County's decision not to take a discretionary action is not a violation of
6 the authorizing statute. (In its reply, CAPR even concedes this point.)²³⁴

7
8 **A. Economic Analysis**

9 The Board agrees with the position taken by Ecology; neither the SMA nor the
10 Guidelines require the type of economic analysis suggested by CAPR. Although CAPR
11 states it is not arguing the County was required to prepare something along the lines of an
12 economic impact statement that appears to be in actuality what it is advocating:

13 Yet, in the approximately 30,000 pages of the administrative record
14 produced by respondents, counsel for the CAPR petitioners has found no
15 economic analysis of how this SMP, with its increased buffers, its greater
16 permitting hurdles, and its creation of nonconforming uses and structures,
17 will affect residential property values, property insurance rates, opportunities
18 for financing and refinancing, or costs of regulatory compliance (e.g., expert
19 reports required to meet such new requirements as no net loss standards
20 and mitigation requirements). How, in turn, will changes in residential
21 property values affect property tax collections and the distribution of the tax
burden across the entire county's tax base?²³⁵

22 The statutes referenced by CAPR, RCW 90.58.100(1) and (2), do not include such a
23 mandate:

24 RCW 90.58.100(1): In preparing the master programs, and any amendments
25 thereto, the department and local governments shall to the extent feasible ...

26 (a) Utilize a systematic interdisciplinary approach which will insure the
27 integrated use of the natural and social sciences and the environmental
design arts . . .

28 (d) Conduct or support such further research, studies, surveys, and
29 interviews as are deemed necessary [and]

30 (e) Utilize all available information regarding hydrology, geography,
31 topography, ecology, economics, and other pertinent data . . .
32

²³⁴ CAPR Reply Brief, p. 3.

²³⁵ CAPR Reply Brief, p. 6.

1 RCW 90.58.100(2): [t]he master programs shall include, when appropriate,
2 the following:(a) An economic development element for the location and
3 design of industries, projects of statewide significance, transportation
4 facilities, port facilities, tourist facilities, commerce and other developments
5 that are particularly dependent on their location on or use of the shorelines of
6 the state

7 Neither does WAC 173-26-201(2)(a)'s directive "to identify and assemble the most current,
8 accurate, and complete scientific and technical information available that is applicable to the
9 issues of concern" require an economic analysis of the type CAPR envisions.

10 Clearly RCW 90.58.100(2) mandates the inclusion of an **economic development**
11 **element** in an SMP. As that statute provides, that particular element must address " . . . the
12 location and design of industries, projects of statewide significance, transportation facilities,
13 port facilities, tourist facilities, commerce and other developments that are particularly
14 dependent on their location on or use of the shorelines of the state" Jefferson County's
15 SMP includes that element in Article 3, Section 2 where one finds a purpose statement and
16 overall economic development goals:
17

18 Economic Development

19 A. Purpose

20 As required by RCW 90.58.100(2)(a), **the economic development goals**
21 **address the location and design of industries, transportation facilities,**
22 **port facilities, tourist facilities, commerce and other developments that**
23 **are particularly dependent on their location on or use of the shorelines.**

24 B. Goals

25 1. Encourage viable, orderly economic growth through economic activities
26 that benefit the local economy and are environmentally sensitive. Such
27 activities should not disrupt or degrade the shoreline or surrounding
28 environment.

29 2. Accommodate and promote water-oriented industrial and commercial uses
30 and developments, giving highest preference to water-dependent uses.

31 3. Encourage water-oriented recreational use as an economic asset that will
32 enhance public enjoyment of the shoreline.

4. Encourage economic development in areas already partially developed
with similar uses when consistent with this Program and the Jefferson
County Comprehensive Plan.²³⁶ (emphasis added)

²³⁶ SMP, Article 3, pp. 3-1, 3-2.

1 Those goals are implemented by the general policies and regulations in the SMP's
2 Article 6 and the more specific policies and regulations in Articles 7 and 8. Article 4's
3 Shoreline Environment Designations (SED) include guides and regulations for development
4 within the various types of shorelines. For example, recreational opportunities are provided
5 for within the Conservancy SED, single family/high density residential uses within the
6 Shoreline Residential SED, and within the High Intensity area, commercial, industrial and
7 similar uses are allowed.²³⁷

9 The Use Table at Article 4, pages 4-6 through 4-8 specifically lists allowable locations
10 for the various types of uses.²³⁸ The regulations in subsequent Articles include additional
11 location and design criteria. The Land Use Element's provisions reflect the requirements of
12 WAC 173-26-201(2)(d).²³⁹

14
15 ²³⁷ SMP Article 4, pp. 4-2 through 4-5.

16 ²³⁸ *Id.* pp. 4-6 through 4-8.

17 ²³⁹ WAC 173-26-201(2)(d). "Preferred uses. As summarized in WAC 173-26-176, the act establishes policy
18 that preference be given to uses that are unique to or dependent upon a shoreline location. Consistent with
19 this policy, these guidelines use the terms 'water-dependent,' 'water-related,' and 'water-enjoyment,' as
20 defined in WAC 173-26-020, when discussing appropriate uses for various shoreline areas. Shoreline areas,
21 being a limited ecological and economic resource, are the setting for competing uses and ecological protection
22 and restoration activities. Consistent with RCW 90.58.020 and WAC 173-26-171 through 173-26-186, local
23 governments shall, when determining allowable uses and resolving use conflicts on shorelines within their
24 jurisdiction, apply the following preferences and priorities in the order listed below, starting with (d)(i) of this
25 subsection. For shorelines of statewide significance, also apply the preferences as indicated in WAC 173-26-
26 251(2).

27 . . . (i) Reserve appropriate areas for protecting and restoring ecological functions to control pollution and
28 prevent damage to the natural environment and public health. In reserving areas, local governments should
29 consider areas that are ecologically intact from the uplands through the aquatic zone of the area, aquatic
30 areas that adjoin permanently protected uplands, and tidelands in public ownership. Local governments should
31 ensure that these areas are reserved consistent with constitutional limits.

32 (ii) Reserve shoreline areas for water-dependent and associated water-related uses. Harbor areas,
established pursuant to Article XV of the state Constitution, and other areas that have reasonable commercial
navigational accessibility and necessary support facilities such as transportation and utilities should be
reserved for water-dependent and water-related uses that are associated with commercial navigation unless
the local governments can demonstrate that adequate shoreline is reserved for future water-dependent and
water-related uses and unless protection of the existing natural resource values of such areas preclude such
uses. Local governments may prepare master program provisions to allow mixed-use developments that
include and support water-dependent uses and address specific conditions that affect water-dependent uses.

(iii) Reserve shoreline areas for other water-related and water-enjoyment uses that are compatible with
ecological protection and restoration objectives.

(iv) Locate single-family residential uses where they are appropriate and can be developed without significant
impact to ecological functions or displacement of water-dependent uses.

(v) Limit nonwater-oriented uses to those locations where the above described uses are inappropriate or
where nonwater-oriented uses demonstrably contribute to the objectives of the Shoreline Management Act.

1 The Board's role is not to second-guess policy decisions made by local jurisdictions.
2 Determinations of the proper balance to strike between the allowance of "all reasonable and
3 appropriate uses" and their locations with the mandate to "control ... pollution" and prevent
4 "damage to the natural environment,"²⁴⁰ lie with the elected legislative bodies of local
5 jurisdictions, provided the ultimate decisions comport with the requirements of the SMA and
6 the guidelines. In this instance, CAPR has not met its burden to establish the balance set by
7 Jefferson County violates RCW 90.58.020, RCW 90.58.100(1) and (2), RCW 90.58.620,
8 WAC 173-26-201(2) or WAC 173-26-241(3).
9

10 **The Board finds** CAPR has failed to meet either burden of proof to establish
11 violations of RCW 90.58.020, RCW 90.58.100(1) and (2), RCW 90.58.620, WAC 173-26-
12 201(2) or WAC 173-26-241(3) in regard to the consideration of the social sciences,
13 specifically economics.
14

15 **B. Lack of Science**²⁴¹
16

17 One of CAPR's arguments, also made by OSF, is that the CIA did not adequately
18 consider and assess the benefits provided by the prior SMP or protections provided by other
19 laws and regulations. A detailed analysis of CAPR's argument regarding the failure to
20 consider the benefits of the prior SMP or other applicable regulations is unwarranted as that
21 allegation is addressed thoroughly under OSF's Issue No. 1. It is sufficient to state RCW
22 90.58.080 required Jefferson County to develop a new SMP, in compliance with the SMA
23 and the Guidelines.
24

25 In the portion of its arguments related to a lack of scientific support for the SMP's
26 regulations, CAPR argues there are violations of RCW 90.58.100(1)(a) and (d) as well as
27 WAC 173-26-201(3)(c). The former provides as follows:
28

29
30 Evaluation pursuant to the above criteria, local economic and land use conditions, and policies and regulations
31 that assure protection of shoreline resources, may result in determination that other uses are considered as
32 necessary or appropriate and may be accommodated provided that the preferred uses are reasonably
provided for in the jurisdiction."

²⁴⁰ RCW 90.58.020.

²⁴¹ As stated above, CAPR argues violations of WAC 173-26-186(8)(a). The Board has not addressed that
allegation as it was not included within the alleged violations set forth in CAPR's PFR nor in the Board's
Prehearing Order First General Issue or the particular sub issues.

1 (1) The master programs provided for in this chapter, when adopted or
2 approved by the department shall constitute use regulations for the various
3 shorelines of the state. In preparing the master programs, and any
4 amendments thereto, the department and local governments shall to the
5 extent feasible:

6 (a) Utilize a systematic interdisciplinary approach which will insure the
7 integrated use of the natural and social sciences and the environmental
8 design arts;

9 d) Conduct or support such further research, studies, surveys, and interviews
10 as are deemed necessary;

11 CAPR asserts the County failed to meet the requirements of that statute, stating the
12 County's CIA and its SI are incomplete. Like OSF, CAPR complains those documents lack
13 field verification as well as a complete analysis of existing conditions as they were only
14 based upon photographs and literature. CAPR points out that the SI acknowledges it makes
15 no representation as to the exact ownership of specific areas of the County shoreline.

16 As discussed in OSF Issue 1, there is nothing in the SMA nor in the applicable
17 Guidelines which requires field verification of existing conditions. Nor is there any
18 requirement to show specific ownership of properties. CAPR provides no support for those
19 allegations. The use of aerial photographs is specifically referenced in WAC 173-26-
20 201(2)(a) as one of the methods for assembling relevant information:

21 At a minimum, make use of and, where applicable, incorporate all available
22 scientific information, **aerial photography**, inventory data, technical
23 assistance materials, manuals and services from reliable sources of science.
24 (emphasis added)

25 The Board notes that the breadth of information assembled by the County is
26 voluminous. The SI's Section 3, entitled *Ecosystem Characterization and Ecosystem-Wide*
27 *Processes*, provides an overview of the key species and habitats within the County,
28 including threatened and endangered species, analysis of nearshore and freshwater
29 habitats/species, and ecosystem-wide processes, which includes hydrogeologic settings,
30 shoreline processes, process-intensive areas and alterations. Section 4 of the SI, entitled
31 *Reach Inventory and Analyses*, includes 118 pages covering every shoreline reach within
32 the County. The map folio, Exhibit C to the SI, includes more than 30 detailed maps. Those

1 maps show all of the County's "shorelines of the state," marine and freshwater shoreline
2 planning areas, and stream flows (CFS) for the County's rivers and streams. Other maps
3 indicate soil types, channel migration zones, and floodplains. Modifications of the County's
4 shorelines are indicated as are critical areas and critical shoreline habitats. There are maps
5 which show the locations of aquatic vegetation, shoreline use patterns, shellfish harvesting
6 areas, forested areas as well as those with impervious surfaces.
7

8 WAC 173-26-201(3)(c) requires that, "to the extent such information is relevant and
9 reasonably available," a jurisdiction is to gather information regarding, among other things,
10 shoreline and adjacent land use patterns, transportation and utility facilities, existing aquatic
11 and terrestrial wildlife habitats, critical areas, and altered and degraded areas with the
12 potential for restoration.²⁴² The SI includes that information.
13

14 What appears to be one of the underlying bases of CAPR's concerns is the SMP's
15 imposition of a standard 150-foot buffer on all marine shorelines. CAPR states there is no
16 scientific justification in the record for that buffer width. To the contrary, the SI includes
17 summary references to numerous scientific studies which address varying buffer width
18 recommendations. Those studies focused on the effectiveness of various buffer widths in
19 protecting water quality and the provision of wildlife habitat and travel corridors. In almost all
20 instances, the studies recommend buffers consisting of ranges. For example, the SI refers
21 to a 2001 analysis from Levings and Jamieson which suggested buffers of 300 to 450 feet
22 for marine shores. Other studies considered the effectiveness of different buffer widths in
23 the removal of sediments (82- to 300-foot buffers would remove approximately 80% --
24 Brennan & Culverwell; a minimum of 98 feet -- May) and, various pollutants including
25 nitrogen (27 feet to reduce by 60%, 200 feet to reduce by 80% -- Desbonnet; Pentec),
26 metals, and organic chemicals, agricultural runoff (minimum of 79 feet for 20% slopes and
27 160 feet with 30% slopes with slight erosion -- Brennan & Culverwell), and fecal coliform
28 from septic systems (115 feet -- Young; Pentec).²⁴³ Recommendations for wildlife are
29 significantly wider; the average width for wildlife habitat was 288 feet (Knutson & Naef).²⁴⁴
30
31
32

²⁴² WAC 173-26-201(3)(c)(i)-(iii).

²⁴³ SI, p. 5-7.

²⁴⁴ *Id.*, p. 5-8.

1 Exhibit 2960-1822 is an illustration summarizing recommended buffer widths and clearly
2 depicting the ranges: 15 feet to 450 feet for various purposes.

3 Beyond that accumulated science, it is significant that the SMP's adopted 150-foot
4 buffer width is identical to the County's GMA compliant critical areas ordinance buffer width,
5 width that comports with the GMA's Best Available Science requirement for protection of
6 critical areas (RCW 36.70A.172(1)).²⁴⁵
7

8 The County was required to adopt an SMP that assures no net loss. WAC 186-26-
9 186(8)(b).²⁴⁶ In crafting the SMP, it assembled a considerable amount of scientific
10 information, including information related to buffer widths. The County has the latitude to
11 adopt buffer widths which lie within the range of widths recommended by the assembled
12 scientific information. Those widths when applied in conjunction with other applicable SMP
13 regulations must assure NNL. CAPR is correct that the decision to adopt 150-foot marine
14 buffers was a "policy" decision but the parameters of the County's policy choice were
15 established by the science it assembled, reviewed, and considered.
16

17 CAPR did not meet its burden to establish a violation of WAC 173-26-201(3)(c).
18 Neither did CAPR establish a violation of RCW 90.58.100(1)(a) and (d): a failure to employ
19 an interdisciplinary approach in development of the SMP or the need for the County to
20 conduct any further research.
21

22 **For CAPR General Issue One, the Board finds and concludes CAPR has failed**
23 **to meet either burden of proof to establish violations of the policy of RCW 90.58.020,**
24 **or violations of RCW 90.58.100(1)(a) and (d), RCW 98.58.100(2), or WAC 173-26-201(2)**
25 **and (3)(c), in regards to whether the assembled physical and biological sciences**
26 **support the SMP's regulations, including buffer widths.**
27
28
29
30

31 ²⁴⁵ RCW 36.70A.480(3) mandates that: Shoreline master programs **shall provide a level of protection to**
32 **critical areas located within shorelines of the state that assures no net loss of shoreline ecological**
functions necessary to sustain shoreline natural resources as defined by department of ecology guidelines
adopted pursuant to RCW 90.58.060.

²⁴⁶ Local master programs shall include policies and regulations designed to achieve no net loss of those
ecological functions.

1 **Second General Issue**

2 Respondents failed to employ proper procedures in their adoption of the SMP in violation of
3 RCW 36.70A.480(3)(a) and (5); RCW 90.58.050, .090(2); WAC 173-26-090, 100, 110, and
4 120; and WAC 173-26, Part III.

5 CAPR, in support of this issue, incorporates the briefing of OSF and Hood Canal. The
6 arguments involve whether or not a new SMP was required rather than revisions to the prior
7 1989 SMP document (OSF) as well as whether improper procedures were included in the
8 adoption process (Hood Canal).
9

10 **Discussion, Analysis and Board Conclusion**

11 As stated above in the OSF analysis,²⁴⁷ the Board finds RCW 90.50.080 required the
12 County to update its SMP to comply with Ecology's SMP Guidelines. Jefferson County does
13 not need to "justify adoption of a new SMP" as OSF's Issue No. 1 alleges and CAPR alleges
14 here in Issue 2.
15

16 **For CAPR General Issue 2, the Board finds and concludes CAPR has failed to**
17 **meet either burden of proof to establish violations of RCW 36.70A.480(3)(a) and (5);**
18 **RCW 90.58.050, .090(2); WAC 173-26-090, 100, 110, and 120; and WAC 173-26, Part III.**
19

20 **Third General Issue**

21 The vagueness of the SMP results in an excessive delegation of discretion to the regulators
22 thereby violating RCW 90.58.020, RCW 90.58.030(3)(c), RCW 90.58.900 and WAC 173-26-
23 176 and 191.

24 **Applicable Laws**

- 25
- 26 • RCW 90.58.020
 - 27 • RCW 90.58.900
 - 28 • WAC 173-26-191

29 The argument in CAPR's opening brief only addresses alleged violations of RCW
30 90.58.900 and WAC 173-26-191. Here, as in Issue 1, CAPR has merely alleged
31
32

²⁴⁷ See above at p.19 under OSF General Issue #1 Discussion, Analysis and Board Conclusion.

violations²⁴⁸ but failed to relate the specific language of the SMP to the requirements of a particular statute or rule, thus abandoning those allegations.²⁴⁹ Allegations of violations of RCW 90.58.030(3)(c) and WAC 173-26-176 will be dismissed.

Positions of the Parties

CAPR argues the SMP grants excessive regulatory discretion to County administrators. Characterizing the SMP as “essentially a zoning code” CAPR asserts the County must provide sufficient clarity so that citizens can determine “what is allowed and what is prohibited.”²⁵⁰ The SMP’s lack of clarity, argues CAPR, is compounded by Article 1.8:

This Program is exempt from the rule of strict construction; therefore this Program shall be liberally construed to give full effect to its goals, policies and regulations. Liberal construction means that the interpretation of this document shall not only be based on the actual words and phrases used in it, but also by taking its **deemed** or stated purpose into account. Liberal construction means an interpretation that tends to **effectuate the spirit** and purpose of the writing. For purposes of this Program, liberal construction means that the administrator shall interpret the regulatory language of this Program in relation to the broad policy statement of RCW 90.58.020, and make determinations which are in keeping with those policies as enacted by the Washington State Legislature.²⁵¹ (emphasis added)

CAPR contends use of words such as “deemed” and “spirit” included in the cited article exacerbate the lack of clarity of the policies and regulations and constitute an “open invitation to [regulatory] overreach.”²⁵² It states that while the SMA is subject to liberal construction (RCW 90.58.900), local jurisdictions have no similar authority to apply that standard of construction.

²⁴⁸ The section of CAPR’s opening brief addressing Issue 3 concludes with: “Upon the arguments here advanced, the SMP violates RCW 90.58.020, RCW 90.58.030(3)(c), RCW 90.58.900, WAC 173-26-176 and WAC 173-26-191.” CAPR Brief, p. 20. Yet the argument itself fails to even reference RCW 90.58.030(3)(c) and WAC 173-26-176.

²⁴⁹ That failure also appears in relation to CAPR’s argument regarding WAC 173-26-191. However, the WAC is referenced in the opening brief and sufficient argument was presented in support of a violation of that rule. It is incumbent upon a petitioner to relate SMP language to a statute or rule. What does the statute or rule state and how was it violated?

²⁵⁰ CAPR Brief at 16.

²⁵¹ Article 1.8, p. 1-5.

²⁵² CAPR Brief, p. 18.

1 CAPR cites the following as examples of the SMP's vague language: Articles 6.3.A.6,
2 8.3.F.2, 8.5.A.4, 8.8.D.5, 8.8.D.6, 8.8.D.8, and 9.8.3.A.5. It contends those sections include
3 language stating that those applying for development permits are "encouraged" to offer
4 public access and that such language will lead to coercion by local administrators, in effect
5 mandating public access.

6 CAPR also references Article 3.7.B.10 which it states will be used to require property
7 owners to address potential adverse effects of global climate change and sea level rise.
8 Finally, it suggests the "mitigation" requirements will lead to arbitrary and capricious
9 regulation.
10

11 Again, both Ecology and the County address CAPR's argument. The County
12 contrasts CAPR's Issue 3 with Issue 4. It suggests that in Issue 3 CAPR argues the
13 regulations provide too much discretion while in Issue 4, the regulations are so inflexible as
14 to result in a prohibition of shoreline development. The County suggests the SMA and its
15 regulations endorse flexibility, citing RCW 90.58.100(5) and WAC 173-26-201(2)(e) and (f).
16 Ecology first observes CAPR's opening brief arguments under Issue 3 failed to address how
17 any of the statutes or rules referenced in Issue 3 are violated.²⁵³ While the County disputes
18 the allegation of vagueness in provisions applicable to public access and climate change, it
19 states that regulations regarding public access are in fact required by the SMA guidelines.
20 The County also argues the climate change policy (Article 3.7.B.10) is one of 10 Shoreline
21 Use goals and does not constitute a development regulation, and references WAC 173-26-
22 221(4) and (5) as well as WAC 173-26-191(1)(a).
23
24

25 In its Reply Brief, CAPR sets forth WAC 173-26-191(2)(a)(ii) which provides:

26 In order to implement the directives of the SMA, master program regulations
27 shall:

28 (A) Be sufficient in scope and detail to ensure the implementation of the
29 Shoreline Management Act, statewide shoreline management policies of this
30 chapter, and local master program policies.

31 CAPR contends the SMP's failure to meet the "sufficient in scope and detail" requirement
32 will subject development applicants to *ad hoc* interpretations of the SMP.

²⁵³ *Id.*, p. 30.

1 **Discussion, Analysis, and Board Conclusion**

2 The essence of CAPR's argument regarding Issue 3 is that the language in the SMP
3 "fails to attain the level of clarity required" in violation of WAC 173-26-191(2)(a)(ii)'s
4 directive that SMP regulations "be sufficient in scope and detail to ensure implementation of
5 the" SMA.

6 CAPR argues Jefferson County lacks the legal right to include the "liberally construe"
7 clause, yet cites no authority to support that assertion. Beyond that, CAPR opines that
8 "vague" and liberally construed language of the SMP will lead to arbitrary and capricious
9 interpretation and application of the regulations. As examples of vague language CAPR
10 references numerous sections of the SMP. Of those, Sections 6.3.A.6²⁵⁴ and 8.5.A.4²⁵⁵ are
11 policies while 8.3.F.2, 8.8.D.5, 8.8.D.6 and 8.8.D.8 constitute regulations.²⁵⁶

12 The goals and policies of an SMP constitute elements of a jurisdiction's
13 comprehensive plan. RCW 36.70A.480(1).²⁵⁷ It is the development regulations which
14 implement comprehensive plan policies. Thus the Board must decide whether the
15 development regulations are overly vague in violation of WAC 173-26-191(2)(a)(ii). The
16 regulations challenged by CAPR state:

17 8.3.F.2 A use or development shall not be considered water-dependent,
18 water-related or water-enjoyment until the County determines that the
19 proposed design, layout and operation of the use/development meet the
20 definition and intent of the water-dependent, water-related or water-
21 enjoyment designation.

22 8.8.D.5 New multi-unit residential development, including subdivision of land
23 into more than four (4) parcels, shall provide public access/open space for
24 use by development residents and the public. The County may alter the
25 recommended area threshold per constitutional limits or waive this
26 requirement if public access is infeasible due to incompatible uses, safety,
27 impacts to shoreline ecology or legal limitations. The County may require
28

29
30 ²⁵⁴ Single-family residential developments with four (4) or fewer lots/units should not be required to provide
31 public access.

32 ²⁵⁵ Industrial and port uses located in shoreline jurisdiction should provide public access in accordance with
Article 6 section 3 (Public Access) of this Program.

²⁵⁶ CAPR also references 9.8.3.A.5 but there does not appear to be any such paragraph.

²⁵⁷ In *Barrie v. Kitsap County*, 93 Wn.2d 843, 849, 613 P.2d 1148 (1980), the court held "comprehensive plans
generally are not used to make specific land use decisions." A comprehensive plan is a "guide" or "blueprint"
to be used when making land use decisions.

alternatives to on-site physical access if on-site physical access is infeasible for the reasons noted.

8.8.D.6 As per Article 6 of this Program, new or expanded subdivisions and planned unit developments comprised of four (4) or more lots or units shall provide public access to publicly owned shorelines or public water bodies unless:

The site is designated in a shoreline public access plan for a greater component of public access; or

The public access is demonstrated to be infeasible or inappropriate.

8.8.D.8 When required for multi-lot/multi-unit residential development, the amount of public access/open space area shall be determined by site analysis per constitutional limits. The County may waive this requirement if public access is infeasible due to incompatible uses, risks to health or safety, impacts to shoreline ecology or legal limitations. In such cases, the County may require alternatives to on-site physical access if on-site physical access is infeasible for the reasons noted.

CAPR's arguments regarding these regulations is that property developers will be "encouraged" (interpreted by CAPR as "coerced") to provide public access.²⁵⁸ However, the Board fails to find the word "encouraged" (or any language that would lead to inappropriate "encouragement") anywhere in the cited regulations; it does not even appear in the two referenced policies. Nor can the Board conclude the regulations "fail to attain the level of clarity required." CAPR neglects to indicate any specific language that could be interpreted as lacking required clarity. Article 8.3.F.2 requires a determination that a use or development meets certain definitions included in Article 2. Articles 8.8.D.5 and 8.8.D.6 are also very specific: they state "New multi-unit residential development, including subdivision of land into more than four (4) parcels, shall provide public access/open space" (8.8.D.5) and "new or expanded subdivisions and planned unit developments comprised of four (4) or more lots or units shall provide public access" (8.8.D.6). Beyond that, WAC 173-26-221(4)(iii) requires jurisdictions to:

Provide standards for the dedication and improvement of public access in developments for water-enjoyment, water-related, and nonwater-dependent

²⁵⁸ CAPR Brief, p. 19.

1 uses and for the subdivision of land into more than four parcels. In these
2 cases, public access should be required.

3 The foregoing requirement is subject to specific exemptions, including infeasibility and
4 constitutional limitations. By including public access regulations, the Board finds that
5 Jefferson County was meeting the requirements of WAC 173-26-221(4)(iii).
6

7 CAPR also refers to Article 3.7.B.10, a Goal which provides: "Encourage all use and
8 development to address potential adverse effects of global climate change and sea level
9 rise."²⁵⁹ Again, this is a Goal, not a regulation. As Ecology observes, the SMA Guidelines
10 include the following:

11 The policy goals of the act, implemented by the planning policies of master
12 programs, may not be achievable by development regulation alone. Planning
13 policies should be pursued through the regulation of development of private
14 property only to an extent that is consistent with all relevant constitutional
15 and other legal limitations (where applicable, statutory limitations such as
16 those contained in chapter 82.02 RCW and RCW 43.21C.060) on the
17 regulation of private property. Local government should use a process
18 designed to assure that proposed regulatory or administrative actions do not
19 unconstitutionally infringe upon private property rights. A process established
20 for this purpose, related to the constitutional takings limitation, is set forth in a
21 publication entitled, "*State of Washington, Attorney General's Recommended*
22 "*Process for Evaluation of Proposed Regulatory or Administrative Actions to*
23 "*Avoid Unconstitutional Takings of Private Property*," first published in
24 February 1992. The attorney general is required to review and update this
25 process on at least an annual basis to maintain consistency with changes in
26 case law by RCW 36.70A.370.

27 Finally, CAPR suggests without supporting argument that the mitigation requirements
28 "will lead to arbitrary and capricious regulation of land." Mitigation sequencing has been an
29 accepted practice for decades. For example, the Washington State Environmental Policy
30 Act (SEPA) (Chapter 43-21C RCW), administered by Ecology, and Section 404 of the
31 federal Clean Water Act, administered by the Corps and EPA, both require application of
32 mitigation.²⁶⁰ CAPR does not show how the County's provision for mitigation sequencing,

²⁵⁹ *Id.* at 3-5.

²⁶⁰ WAC 197-11-768 (SEPA) sets forth the definition of "Mitigation":

"Mitigation" means:

(1) Avoiding the impact altogether by not taking a certain action or parts of an action;

generally employed to make otherwise prohibited development permissible, will achieve arbitrary and capricious regulatory results.

Mere allegations that the SMP will be administered arbitrarily or capriciously are insufficient to meet a petitioner's burden of proof. Mere allegations of vagueness, or a failure to "attain the level of clarity required," similarly fails to meet a petitioner's burden of proof.

For CAPR General Issue Three, the Board finds and concludes CAPR has failed to meet either burden of proof to establish the SMP fails to attain the level of clarity required or results in an excessive delegation of discretion to regulators, in violation of RCW 90.58.020, RCW 90.58.900 or WAC 173-26-191(2)(a)(ii).

Fourth General Issue

The particular showings required to obtain permits for such common shoreline facilities as beach access structures, boating facilities, and armoring, as well as any development in flood-prone areas, result in a de facto prohibition of these facilities in violation of RCW 90.58.020, RCW 90.58.100(6); and WAC 173-26-201(2)(d) and 221(3)(c)(i).

Applicable Laws

- RCW 90.58.020
- RCW 90.58.100(6)
- WAC 173-26-201(2)(d)
- WAC 173-26-221(3)(c)(i)

Position of the Parties

CAPR argues the permitting requirements for various shoreline facilities are so onerous as to result in a prohibition. It contends those requirements were adopted without regard to science relating allowance of those facilities to negative shoreline environmental effects. CAPR references the CIA which observed the "marine shorelines are in relatively

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- (2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce impacts;
- (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- (4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;
- (5) Compensating for the impact by replacing, enhancing, or providing substitute resources or environments; and/or
- (6) Monitoring the impact and taking appropriate corrective measures."

1 good condition ecologically,” yet the County chose to replace 30-foot marine shoreline
2 setbacks with a standard 150-foot buffer. In support of its assertion regarding a failure to
3 scientifically correlate negative shoreline impacts with a particular development, CAPR cites
4 information from the record authored by Donald J. Flora.²⁶¹

5 Specifically, CAPR addresses beach access stairs, setting forth SMP policies and
6 regulations which subject public and private access structures to a conditional use permit
7 (CUP) process in five of the six SEDs.²⁶² CAPR argues the permitting process shifts the
8 burden to property owners to show allowance of beach access stairs would have no
9 negative environmental effect. It observes single-family residences are a preferred shoreline
10 use and that beach access structures are an integral part of the enjoyment of such a use.

11 CAPR also cites similar regulations applicable to other shoreline uses such as boat
12 launches, docks, piers, floats, lifts, marinas, mooring buoys, and armoring. Finally, it
13 addresses SMP policies addressing public access and limitations of development in flood
14 prone areas.
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16 The County focuses its argument on SMA and WAC guidelines directing it to
17 evaluate impacts and to ensure no net loss of ecological functions, citing WAC 173-26-
18 201(2)(c), (e) and (f), and WAC 173-26-221(2). It disputes the allegations of a de facto
19 prohibition of the various shoreline uses and developments listed by CAPR, contending its
20 SMP achieves a balance between protection and development.
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22 Ecology disputes CAPR’s implication that protective regulations are unnecessary. It
23 states the record establishes shoreline development has detrimental impacts.²⁶³ It also
24 disputes the suggestion the regulatory structure results in a de facto prohibition. It points to
25 areas where some of CAPR’s listed uses are allowed. For those uses in areas where CUPs
26 are required, it states the regulations are tailored to ensure no net loss in compliance with
27 the guidelines, that historically a small percentage of CUPs are denied, and finally, that
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32 ²⁶¹ CAPR Brief, p. 21.

²⁶² Private beach access structures accessory to single-family residential development are prohibited in the Natural SED.

²⁶³ Ecology Brief, p. 32.

1 CAPR has ignored the mitigation sequencing provisions which allow a project to proceed if
2 impacts are mitigated.

3 4 **Discussion, Analysis, and Board Conclusion**

5 In its opening brief, CAPR spends approximately three pages addressing what it
6 states is a failure of the County to base its regulatory SMP scheme on an adequate
7 “scientific base.”²⁶⁴ However, the specific violation alleged in Issue 4 is that the regulations
8 are so onerous that various types of shoreline uses (beach access stairs, boating facilities,
9 development in flood prone areas and shoreline armoring/protection) will be prohibited. The
10 statutes and rules CAPR argues were violated include the policies of RCW 90.58.020, RCW
11 90.58.100(6)’s mandate that SMPs include “standards governing the protection of single-
12 family residences and appurtenant structures against damage or loss due to shoreline
13 erosion,” the WAC section on preferred shoreline uses (WAC 173-26-201(2)(d)) and finally,
14 the WAC section on flood-prone area development (WAC 173-26-221(3)(c)(i)). The need for
15 a “scientific base” is not implicated in those statutory sections/rules.
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18 CAPR’s Issue 4 focuses specifically on an alleged de facto prohibition of some
19 potential shoreline uses. The question posed and the one which the Board must address is
20 whether the SMP regulations cited by CAPR constitute a prohibition and whether they
21 violate the cited statutes and rules.

22 As an example, CAPR cites SMP Article 6.3.A.9. First of all, this a **policy**, not a
23 regulation. As a policy, it does not impose any requirements. Secondly, public access to
24 publicly owned areas is a required element of an SMP and the WACs mandate promotion
25 and enhancement of public access.²⁶⁵ The specific **regulations** CAPR challenges include
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28 ²⁶⁴ CAPR Brief, p. 23. CAPR states the County’s failure to tailor regulations to specific property conditions
violated WAC 173-26-186 (5), an allegation not contained in Issue 4.

29 ²⁶⁵ RCW 90.58.100(2)(b); WAC 173-26-221(4)(b): “Principles. Local master programs shall:

30 (i) Promote and enhance the public interest with regard to rights to access waters held in public trust by
the state while protecting private property rights and public safety.

31 (ii) Protect the rights of navigation and space necessary for water-dependent uses.

32 (iii) To the greatest extent feasible consistent with the overall best interest of the state and the people
generally, protect the public’s opportunity to enjoy the physical and aesthetic qualities of shorelines of the
state, including views of the water.

(iv) Regulate the design, construction, and operation of permitted uses in the shorelines of the state to
minimize, insofar as practical, interference with the public’s use of the water.”

1 those applicable not only to beach access structures (Article 7.1) but also to various types of
2 boating facilities (Article 7.2)²⁶⁶, armoring (Article 7.8), and flood control structures (Article
3 7.5).

4 Review of the SMP indicates beach access structures accessory to single-family
5 residential development are allowed landward of the ordinary high water mark (OHWM)
6 pursuant to an administrative conditional use permit process (Article 4, p. 4-5, Table 1) in
7 the Conservancy, Shoreline Residential, and High Intensity SEDs. They are prohibited only
8 in the Natural SED. Prohibition in natural areas comports with the purpose of that SED
9 designation: "The purpose of the 'natural' environment is to protect those shoreline areas
10 that are relatively free of human influence or that include intact or minimally degraded
11 shoreline functions intolerant of human use."²⁶⁷ These systems require that only very low
12 intensity uses be allowed in order to maintain the ecological functions and ecosystem-wide
13 processes.²⁶⁸ While CAPR is correct in stating single family residential use is one of the
14 preferred uses under the SMA,²⁶⁹ the Board does not accept the implication that the County
15 may not restrict any appurtenant structures or uses on residential property. As the Court of
16 Appeals held in *Samson v. Bainbridge Island* ". . . private property rights are secondary to
17 the SMA's primary purpose, which is 'to protect the state shorelines as fully as possible.'"²⁷⁰

18 Similarly, residential boat launch facilities are either permitted or allowed as a
19 conditional use permit (administrative) in all SEDs other than Priority Aquatic. Residential
20 docks, piers, floats, and lifts are permitted in the Aquatic, Shoreline Residential, and High
21 Intensity SEDs and by administrative conditional use in the Conservancy SED.

22 CAPR also references Article 7.5.A.1 in its concerns regarding flood control
23 structures. That **policy** states "The County should prevent the need for flood control works
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28 ²⁶⁶ Boat launches, docks, piers, floats, lifts, marinas, and mooring buoys.

29 ²⁶⁷ WAC 173-26-211(5)(a)(i). See also WAC 173-26-211(5)(a)(iii)(C) which states, in part, "Generally, but not
30 necessarily, ecologically intact shorelines are free of structural shoreline modifications, structures, and
31 intensive human uses."

32 ²⁶⁸ WAC 173-26-211(5)(a)(i).

²⁶⁹ "Alterations of the natural condition of the shorelines of the state, in those limited instances when
authorized, shall be given priority for single-family residences and their appurtenant structures, ports. . . ."
RCW 90.58.020.

²⁷⁰ *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49 (Wash. Ct. App. 2009). In which the court quoted
Lund v. Ecology, 93 Wn. App. 329, at 336-37 (quoting *Buechel*, 125 Wn.2d at 203).

1 by limiting new development in flood-prone areas.” CAPR argues this sentence is another
2 “example of the regulatory overreach” of the SMP. Article 7.5.A.1 states a policy goal, one
3 which addresses principles and directives included in WAC 173-26-221(3)(b) and (c):

4 Over the long term, the most effective means of flood hazard reduction is to
5 prevent or remove development in flood-prone areas, to manage storm water
6 within the flood plain, and to maintain or restore river and stream system's
7 natural hydrological and geomorphological processes. . . Applicable
8 shoreline master programs should include provisions to limit development
9 and shoreline modifications that would result in interference with the process
10 of channel migration that may cause significant adverse impacts to property
11 or public improvements and/or result in a net loss of ecological functions
12 associated with the rivers and streams. WAC 173-26-221(3)(b):

13 New development or new uses in shoreline jurisdiction, including the
14 subdivision of land, should not be established when it would be reasonably
15 foreseeable that the development or use would require structural flood
16 hazard reduction measures within the channel migration zone or floodway.
17 WAC 173-26-221(3)(c).

18 Those code sections require local jurisdictions to adopt SMPs that address
19 development in flood-prone areas and the allowance of flood control structure uses. Those
20 regulations, Article 7.5.B.1-6 and Article 7.5.C.1-12, implement the policy of Article 7.5.A.1.
21 A review of Article 7.5.B.1-6 indicates flood control structures are subject to allowance
22 through a discretionary conditional use process in all SEDs other than the Natural.

23 CAPR's allegations that most of the uses are subject to conditional use permit (CUP)
24 processes are accurate. However, requiring consideration of impacts through a conditional
25 use permit process is a valuable tool for accommodating shoreline uses while providing for
26 control of pollution and preventing damage to the natural environment. It is also a tool
27 specifically recognized and, in some instances required, by the Guidelines. See WAC 173-
28 26-191(2)(a)(iii)(B):

29 Conditional use and variance provisions.

30 RCW 90.58.100(5) states:

31 **"Each master program shall contain provisions to allow for the varying**
32 **of the application of use regulations of the program, including**
provisions for permits for conditional uses and variances, to insure that
strict implementation of a program will not create unnecessary

1 **hardships or thwart the policy enumerated in RCW 90.58.020. Any such**
2 **varying shall be allowed only if extraordinary circumstances are shown**
3 **and the public interest suffers no substantial detrimental effect. The**
4 **concept of this subsection shall be incorporated in the rules adopted**
5 **by the department relating to the establishment of a permit system as**
6 **provided in RCW 90.58.140(3)."**

7 All master programs shall include standards for reviewing conditional use
8 permits and variances which conform to chapter 173-27 WAC.

9 WAC 173-26-201(3)(d)(iii) refers to the CUP process as a method for ensuring uncommon
10 impacts are addressed so as to insure no net loss.

11 While the conditional use permit process may indeed be burdensome for some
12 property owners, CAPR has not met its burden to show the use of those processes will
13 result in a *de facto* prohibition of the various shoreline uses it references. A primary goal of
14 the SMA is to "prevent the inherent harm in an uncoordinated and piecemeal development
15 of the state's shorelines," described in RCW 90.58.020 as a "clear and urgent demand". The
16 policies included in that statute include prioritizing uses that require a shoreline location,²⁷¹
17 the promotion of public access and enjoyment opportunities,²⁷² and the protection of the
18 environmental resources of state shorelines.²⁷³ The use of conditional use permit
19 processes provides a method to ensure compliance with the policies of RCW 90.58.020,
20 allowing for various human uses, while protecting the shorelines of the state and its waters.

21 Nor has CAPR met its burden to establish a violation of RCW 90.58.100(6).²⁷⁴ The
22 County's SMP includes standards for the protection of single-family residences and their
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²⁷¹ "This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life. . . ." RCW 90.58.020.

²⁷² "This policy contemplates protecting...public rights of navigation and corollary rights incidental thereto."

"Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water." RCW 90.58.020.

²⁷³ "... . . . uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline." RCW 90.58.020.

²⁷⁴ RCW 90.58.100(6). "Each master program shall contain standards governing the protection of single-family residences and appurtenant structures against damage or loss due to shoreline erosion. The standards shall govern the issuance of substantial development permits for shoreline protection, including structural methods such as construction of bulkheads, and nonstructural methods of protection. The standards shall provide for methods which achieve effective and timely protection against loss or damage to single-family residences and appurtenant structures due to shoreline erosion. The standards shall provide a preference for permit issuance

1 appurtenant structures. As referenced above, those standards govern the issuance of
2 substantial development permits for shoreline protection. CAPR has not shown the
3 regulations fail to achieve effective and timely protection against loss or damage to single-
4 family residences.²⁷⁵ See SMP Article 7.8, pp. 7-29 through 7-36.

5 **For CPR General Issue Four, the Board finds and concludes CAPR has failed to**
6 **meet either burden of proof to establish the regulations applicable to beach access**
7 **structures, boating facilities, development in flood-prone areas or shoreline armoring**
8 **result in a de facto prohibition of those uses, in violation of RCW 90.58.020, RCW**
9 **90.58.100(6), WAC 173-26-201(2)(d) and 221(3)(c)(i).**

10 **C. Hood Canal Sand and Gravel, LLC (Hood Canal)**

11 **Issue No. 1**

12 Must contentions as to the violation of constitutionally protected private property rights be
13 considered pursuant to WAC 173-26-186(5)?

14 **Applicable Law**

- 15 • WAC 173-26-186(5)

16 **Positions of the Parties**

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Petitioner Hood Canal applied for a permit to construct a marine transport facility for
aggregate materials. They contend their application is a vested property right and a portion
of the vested application is water dependent.²⁷⁶ If their application is approved by the
County's hearing examiner and other authorities, the challenged SMP will apply a non-
conforming status on the project, thus compromising financing, expansion, replacement, or
repairs. Hood Canal asserts this designation deprives them of their constitutional property
rights. Hood Canal made their objections known to the County during the SMP adoption
process, but the County did not meaningfully analyze constitutional issues raised as
required in WAC 173-26-186(5). Hood Canal argued the County's analysis conducted under

for measures to protect single-family residences occupied prior to January 1, 1992, where the proposed
measure is designed to minimize harm to the shoreline natural environment."

²⁷⁵ See SMP Article 7.8, pp. 7-29 through 7-36.

²⁷⁶ Hood Canal Brief, November 21, 2014 at 6.

1 the Attorney General's memorandum on constitutional private property rights "has posited
2 merely a conclusory, 'illustrative only' and on its face 'brief and general' analysis . . ." ²⁷⁷ The
3 legal review on takings was inadequate to give the public or decision-makers a foundation
4 to analyze or determine compliance with RCW 36.70A.020(6) (GMA Goal on Property
5 Rights). Petitioner asks the Board to determine whether the County and Ecology
6 substantively and reasonably engaged in the process required in WAC 173-26-186(5). ²⁷⁸
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8 Respondent Jefferson County explained it conducted a thorough analysis, "some of
9 which was in the form of attorney-client communications which need not be made a part of
10 the SMP record. RCW 36.70A.370(4)." ²⁷⁹ The County states it relied upon the Attorney
11 General's 2006 *Advisory Memorandum on Avoiding Unconstitutional Takings* and produced
12 an analysis from its Prosecuting Attorney to insure that limitations in SMP Article 1.3.D on
13 regulation of private shoreline property were constitutional. ²⁸⁰
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15 Respondent Ecology explains that simply because the SMP renders a use
16 nonconforming does not mean WAC 173-26-186(5) has been violated. WAC173-26-186(5)
17 does not "dictate a particular outcome, nor does it preclude provisions that result in
18 nonconformities." ²⁸¹ Instead, Ecology argues, local government must consider constitutional
19 limitations in enacting shoreline regulations. Ecology clarifies that private property takings
20 analysis is not subject to public comment, and neither the SMA nor the SMA Guidelines
21 contemplate substantive review of the takings analysis by the Board. ²⁸² Ecology cites RCW
22 36.70A.370(4) which allows the review under WAC 173-26-186(5) to be protected by
23 attorney-client privilege. Ecology states the record demonstrates the County conducted a
24 takings analysis in accordance with the Attorney General's memorandum and WAC 173-26-
25 186(5). ²⁸³
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29 ²⁷⁷ *Id.* at 6.

30 ²⁷⁸ *Id.* at 8.

31 ²⁷⁹ Jefferson County Brief, January 5, 2015 at 3

32 ²⁸⁰ *Id.* at Ex. 2960-2570, Questions and Answers from Jefferson County and Ex. 2960-2595 *Advisory Memorandum: Avoiding Unconstitutional Takings on Private Property*.

²⁸¹ Ecology Brief, January 7, 2015, at 8-9.

²⁸² Nor do the SMA Guidelines require that the SMP itself contain a "constitutional analysis" as Petitioner claims. Hood Canal Brief at 7.

²⁸³ IR ECY000162-64; ECY018915-918.

1 **Discussion, Analysis, and Board Conclusion**

2 The Board reviews the question of whether the County complied with WAC
3 173-26-186(5) by completing the analysis required in the Attorney General's
4 Memorandum. Jurisdictions are required to comply with the following:

5 WAC 173-26-186(5)

6 Local government should use a process designed to assure that proposed
7 regulatory or administrative actions do not unconstitutionally infringe upon
8 private property rights. A process established for this purpose, related to the
9 constitutional takings limitation, is set forth in a publication entitled, "State of
10 Washington, Attorney General's Recommended Process for Evaluation of
11 Proposed Regulatory or Administrative Actions to Avoid Unconstitutional
12 Takings of Private Property," first published in February 1992.

13 Jefferson County completed its analysis under the Attorney General memorandum
14 which was then summarized for the public in two documents. The first document lists
15 questions and answers from the AG analysis.²⁸⁴ The second, a memorandum from
16 Prosecuting Attorney David Alvarez, is a more in-depth response from the County to
17 questions arising from review of the SMP.²⁸⁵ The Alvarez memorandum explains in great
18 detail how and why the County can legally adopt the SMP, the court decisions supporting
19 SMP regulations and County responses to five questions in the AG memorandum. The
20 responses in the latter memorandum are protected under attorney-client privileges.²⁸⁶ The
21 Board finds and concludes from the record that the County did analyze and respond to the
22 AG memorandum and thus completed the required steps in WAC 173-26-186(5). That
23 Petitioners are dissatisfied with the County's decision is not dispositive.
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26 **For Hood Canal Issue One, the Board finds and concludes Hood Canal has**
27 **failed to meet the burden of proof to establish the County did not meet requirements**
28 **in WAC 173-26-186(5).**
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²⁸⁴ Ecology Brief, Ex. ECY 000162-64.

²⁸⁵ Jefferson County Brief at Ex. 2690-2570.

²⁸⁶ *Id.* at 12-13 in Ex. 2960-2570.

1 **Issue No. 2**

2 Did Jefferson County ever hold a public hearing on a proposed SMP which included all of
3 the SMP's required objectives and components including compliance with RCW 90.58 .020,
4 RCW 90.58.100 and WAC 173-26-201 (2) (a)?

5 **Applicable Laws**

- 6
- 7 • RCW 90.58.020
 - 8 • RCW 90.58.100
 - 9 • WAC 173-26-201

10 **Position of the Parties**

11 Hood Canal alleges the County failed to follow procedures in the SMA and the
12 Guidelines to develop the SMP and the final SMP contained defects which were not
13 corrected by the County.²⁸⁷ They assert the SMP does not have an economic development
14 element or an explanation about why it was omitted.²⁸⁸ Next, Hood Canal emphasizes the
15 "record is devoid of any evidence of contact with Petitioners regarding significant scientific
16 and technical information . . . prepared in relation to the vested [Hood Canal] application."²⁸⁹
17 Hood Canal argues the County's Cumulative Impact Analysis was adopted after the SMP
18 and did not contain "reference to the then-pending application by [Hood Canal]" although
19 the CIA contained information on other pending applications.²⁹⁰ For these reasons, Hood
20 Canal requests the Board to find Respondents failed to comply with RCW 90.58.020, .100
21 and WAC 173-26-201(2)(A).²⁹¹

22 Respondent Ecology clarifies the SMA does not require "public review of the CIA" nor
23 does Ecology "approve non-regulatory documents" as part of developing an SMP. The CIA
24 is intended to inform decision-makers about the effects of an SMP and is part of an iterative
25 process as the SMP evolves from one draft to the next. The County accepted public
26 comments before adopting the final CIA in mid-2011. Commenting on Hood Canal's
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31 ²⁸⁷ Hood Canal Brief at 14; See *also*, Hood Canal Brief, Ex. 5; ECY 002139.

32 ²⁸⁸ *Id.* at 14.

²⁸⁹ *Id.* at 15.

²⁹⁰ *Id.* at 15.

²⁹¹ *Id.* at 16.

1 proposed project application, Ecology explained the Environmental Impact Statement for
2 Hood Canal's project was not completed until after the SMP was adopted.²⁹²

3 Respondent Jefferson County states Hood Canal Issue 2 was abandoned because
4 no legal arguments were presented demonstrating non-compliance with the SMA. In
5 addition, the County contends Hood Canal did not argue the issue as presented to the
6 Board: whether the County held a "public hearing on a proposed SMP which included all of
7 the SMP's required objectives."²⁹³ In response to allegations in the issue statement, the
8 County describes numerous public hearings, public participation processes, and public
9 comments received.²⁹⁴ The County concludes by asking the Board to dismiss Issue 2.²⁹⁵

12 **Discussion, Analysis, and Board Conclusion**

13 The Board agrees with Respondents. Hood Canal provides no legal argument about
14 **how** the SMA was violated as their brief simply lists sections of the law followed by
15 statements about lack of "adequately utilizing a required process," that "defects were never
16 corrected" or that Petitioners were not contacted.²⁹⁶ The Respondents offered the public
17 years of review and opportunities to comment on proposed amendments to the SMP. The
18 record establishes Respondents followed guidance in WAC 173-26-201(3)(b)(i) by ensuring
19 **"that all persons and entities having an interest in the . . . master programs . . . are
20 provided with a full opportunity for involvement in both their development and
21 implementation. . . ."** (emphasis in original) The County established committees with
22 technical and public policy expertise to review ideas and comments from the public.²⁹⁷

28 ²⁹² Ecology Brief at 10-11 See also ECY 000146 Cumulative Impact Analysis (February 2010) showing a table
of developments or activities and associated impacts.

29 ²⁹³ Jefferson County Brief at 4.

30 ²⁹⁴ *Id.* at 4-5.

31 ²⁹⁵ *Id.* at 6.

32 ²⁹⁶ Hood Canal Brief at 13-15.

²⁹⁷ Jefferson County Ordinance No. 07-1216-13 at 2 "WHEREAS, the DCD formed and worked with two
citizen/stakeholder groups, the **Shoreline Technical Advisory Committee** ("STAC") and the **Shoreline
Policy Advisory Committee** ("SPAC"), during the initial phase of project work from 2006 to 2008 to assist
development of new proposed SMP goals, policies, environment designations, and use/development
regulations contained in a Preliminary Draft SMP."

1 Numerous public workshops and meetings were hosted by the County and Ecology to learn
2 about public concerns, address those concerns, and modify drafts of the SMP.²⁹⁸

3 As for Hood Canal's complaints about the timing of the Cumulative Impact Analysis,
4 WAC 173-26-201(3)(a) allows local governments to "modify the timing of the various steps,
5 integrate the process into other planning activities, add steps to the process. . . ." Together,
6 the County and Ecology planned and carried out a complex series of processes which
7 invited public comments and discussion offering the County Commissioners a wide variety
8 of commentary about SMP amendments. Ordinance 07-1216-13 contains extensive
9 descriptions of the public processes and comments including web-links to documents
10 showing major changes to the drafts of the SMP.²⁹⁹ The Board finds the County
11 Commissioners accepted some comments and rejected others; they did so by explaining
12 their rationale in the adopted Ordinance.³⁰⁰ This is their prerogative. Hood Canal's list of
13 complaints are not legal arguments and do not demonstrate how the SMA or the Guidelines
14 were violated.
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17 **For Hood Canal Issue 2, the Board finds and concludes Hood Canal has failed**
18 **to meet either burden of proof to establish the County did not meet requirements in**
19 **RCW 90.58.020, RCW 90.58.100 or WAC 173-26-201.**
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25 ²⁹⁸ *Id.* at 3-38.

26 ²⁹⁹ Jefferson County Ordinance No. 07-1216-13 Ordinance FF #34 at 8 Exceeding the requirements in RCW
27 36.70A.140, RCW 90.58.130 and WAC 173-26- 201, the County put extraordinary effort into informing and
28 engaging stakeholders and the general public in this SMP update project. The actions taken to invite and
29 actively encourage people, groups, entities, agencies and tribes to participate were started early and made
often throughout the multi-year process. See, e.g., Jefferson County Preliminary Draft SMP November 2008 at
[http://www.co.jefferson.wa.us/commdevelopment/PDFS/SMPupdate/PDSMP/Summary%20of%20major%20ch](http://www.co.jefferson.wa.us/commdevelopment/PDFS/SMPupdate/PDSMP/Summary%20of%20major%20changes%20since%20rCWD_FINAL.pdf)
anges%20since%20rCWD_FINAL.pdf.

30 ³⁰⁰ *Id.* at 3 "Whereas, the BoCC considered the public comments during their 27 hours of review and
31 deliberation of the PC Final Rec and directed DCD staff to make document revisions to the PC Final Rec, and
32 prepare the October 22, 2009 DRAFT Locally Approved SMP for further review; and
Whereas, the BoCC further deliberated, requested final document revisions to the October 22, 2009 DRAFT
Locally Approved SMP and directed DCD staff to prepare a final proposed document and subsequently took
action on December 7, 2009 (Resolution 77-09) to locally approve the proposed SMP for submittal to Ecology
for the state's final review and approval. The document was titled the *Locally Approved SMP* ('LA-SMP'). . . ."

1 **Issue No. 3**

2 Does the content of the JCSMP adopted by Ecology substantively violate RCW
3 36.70A.370(1) and (2) and WAC 173-26-186(5) and WAC 173-26-020(6) and (32), and
4 WAC 173-26-186?

5 **Applicable Laws**

- 6
- 7 • RCW 36.70A.370
 - 8 • WAC 173-26-020
 - 9 • WAC 173-26-186

10 **Position of the Parties**

11 Hood Canal alleges the County's decision to prohibit marine transportation of
12 aggregate materials was not supported by scientific or technical evidence pursuant to RCW
13 90.58.020(1) and (3).³⁰¹ Hood Canal also contends the County did not consider how this
14 prohibition conflicts with Jefferson County's Comprehensive Plan which allows mining on
15 adjacent uplands.³⁰² In addition, the County allowed salmon net pens after Ecology found
16 no evidence in the record to prohibit them. Hood Canal argues the record similarly contains
17 no evidence to prohibit mining, yet the County prohibits mining. The Hood Canal petitioners
18 assert that salmon net pens and mining are both water dependent and thus should be
19 treated the same.³⁰³ Asserting that RCW 90.58.020 "clearly and emphatically establishes
20 water dependent uses as a priority," Petitioners complain that Ecology provided inconsistent
21 statutory interpretations for salmon net pens and aggregate materials transportation in
22 violation of RCW 90.58 and WAC 173-26-186.³⁰⁴

25 Ecology responds that Issue 3 should be dismissed because Hood Canal does not
26 argue the same statute and code citations in their brief as those cited in Board's Second
27 Amended Prehearing Order and constitutional claims are beyond this Board's jurisdiction.³⁰⁵
28 However, if the Board considers Hood Canal's arguments, Ecology argues Hood Canal
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31 ³⁰¹ Hood Canal Brief at 18.

32 ³⁰² *Id.* at 18.

³⁰³ *Id.* at 18-19.

³⁰⁴ *Id.* at 19.

³⁰⁵ Second Amended Prehearing Order, Order Granting Second Settlement Extension, and Order on Dispositive Motion (September 5, 2014) Appendix A.

1 mischaracterizes the transportation of aggregate materials as “water dependent” because
2 Hood Canal’s mining operations would not be isolated from land transportation options
3 because the “Pit-to-Pier” mining proposal by Hood Canal is on the mainland.³⁰⁶ In the
4 instant case, Ecology argues “this fact-based inquiry focuses on the extent the project
5 requires a “land-surface interface,” such as whether the mining site is located on an
6 island.”³⁰⁷ Ecology explains the SMP allows mining in High Intensity shoreline designations
7 and it is thus “not correct to point to a single master program provision precluding or limiting
8 a preferred use and argue that it is inconsistent with the SMA simply because it is a
9 preclusion or limitation.”³⁰⁸ Ecology clarified the difference between requiring the County to
10 allow salmon net pens while precluding mining on a mainland site was that the County had
11 not allowed **any** areas for net pens, but pursuant to WAC 173-26-201(2)(d)(ii), the County
12 was required to do so.³⁰⁹ Thus, the County was required by Ecology to find some areas of
13 the shoreline in which net pens would be authorized.³¹⁰

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16 The County made similar arguments to those proffered by Ecology, but added that
17 simply because salmon net pens are treated differently than mining operations does not
18 mean the SMP is non-compliant.³¹¹ The County states Hood Canal’s non-compliance
19 argument is flawed because it “is based on its assertion that ‘salmon net pens’ (aquaculture)
20 must be treated in the same fashion as ‘transportation of aggregate materials’ because, it
21 believes, both are ‘water-dependent’ uses.”³¹² Only the salmon net pens are water
22 dependent whereas the mining operation has access to land transportation. The County
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25 ³⁰⁶ Ecology Brief at 12.

26 ³⁰⁷ *Preserve Our Islands*, 133 Wn. App. at 526-27.

27 ³⁰⁸ *Id.* at 13.

28 ³⁰⁹ WAC 173-26-201(2)(d)(ii). “Reserve shoreline areas for **water-dependent** and associated water-related
29 uses. Harbor areas . . . should be reserved for water-dependent and water-related uses that are associated
30 with commercial navigation unless the local governments can demonstrate that adequate shoreline is reserved
31 for future water-dependent and water-related uses and unless protection of the existing natural resource
32 values of such areas preclude such uses. . . . This isn’t to say that all jurisdictions within the state must
reserve appropriate areas for net pen aquaculture, as there may be some jurisdictions in which such areas do
not exist. As Ecology noted, the provisions in each SMP are contingent on local conditions, and Jefferson
County has large and diverse shorelines in which there are likely to be some areas where this activity could be
sited consistent with protection of the shoreline.” IR ECY018403-04.

³¹⁰ IR ECY007612 Ecology Brief at 14 “Ecology required the County “to develop an approach of limited
allowance for net pens with effective protections for ecological resources.”

³¹¹ Jefferson County Brief at 7.

³¹² *Id.*

1 concludes it is not an island, thus, this case is more like *Ecology v. Hama Hama* in which
2 the Shorelines Hearings Board (SHB) held that prohibition of a sand and gravel pier on
3 Hood Canal was appropriate under the SMA.³¹³ Because the Hama Hama Company mine
4 in Jefferson County was not located on an island, and ground transportation was a viable
5 alternative, the proposed use was deemed not “water-dependent” by the SHB.³¹⁴
6

7 Discussion, Analysis, and Board Conclusion

8 First, the Board dismisses alleged violations of WAC 173-26-020(6) and (32)
9 because Hood Canal does not provide legal argument on this statute. Nor will the Board
10 rule on alleged definition violations because the Board has long ago decided definitions
11 themselves do not prescribe GMA requirements (or in this case SMA requirements).
12 Rather, the Board looks to how the definition is connected to other parts of the law and then
13 rule on how those definitions were used in the context of the law.³¹⁵
14

15 Second, the Board will not rule on alleged violations of RCW 36.70A.370(1) and (2)
16 because these are constitutional claims which are not addressed by this Board. Previously,
17 the Board addressed constitutional claims in its Second Amended Prehearing Order.³¹⁶
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22 ³¹³ Jefferson County Brief at 8; Compare *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 137
23 P.3d 31, 2006 Wn. App. LEXIS 1280 (Wash. Ct. App. 2006) with *Ecology v. Hama Hama Co.*, SHB No. 115
24 (Final Findings, etc., July 21, 1976), 1976 WA ENV LEXIS 87.

25 ³¹⁴ *Id.* at 8 and *Ecology v. Hama Hama Co.*, SHB No. 115 (Final Findings, etc., July 21, 1976), 1976 WA ENV
26 LEXIS 87

27 ³¹⁵ *Leon S. Savaria v. Yakima County*, GMHB Case No. 11-1-0002: RCW 36.70A.030 provides statutory
28 definitions of various terms used in the GMA and as such, does not prescribe GMA requirements. Thus,
29 alleged violations of RCW 36.70A.030 cannot by itself constitute GMA non-compliance, without coupling the
30 definition with another section of the GMA containing a requirement. Order Granting Motion to Dismiss (May 4,
31 2011), p. 2; *Friends of the San Juans v. San Juan County*, GMHB Case No. 13-2-0012c: [[Responding to an
32 argument that a regulation’s definition was vague and susceptible to multiple interpretations resulting in a lack
of sufficient guidance to County staff administering the CAOs, the Board found]: **“In the Board’s view, the
question is not the definitions but rather how those definitions are used in the CAO’s regulatory
scheme. One cannot view the definitions in isolation but must relate them to the regulations
themselves.** It is not a requirement that a definition include adequate standards for appropriate, consistent
administration. The GMA requires those standards to be included somewhere in the regulations.” Final
Decision and Order (September 6, 2013), at 93.

³¹⁶ Second Amended Prehearing Order, Order Granting Second Settlement Extension, And Order On
Dispositive Motion GMHB Case No. 14-2-0008c (September 5, 2014).

1 Third, the Board notes Hood Canal Issue 3 alleges a violation of WAC 173-27-186,
2 but the brief is devoid of legal argument about how it is violated. Absent legal argument, the
3 issue is abandoned.

4 Fourth, the Board looks at Hood Canal's claim that the SMP treats salmon net pens
5 and mining operations differently because both are "water dependent." In accordance with
6 the definition of "water-dependent,"³¹⁷ Hood Canal's proposed mining operation is not
7 "dependent on the water by reason of the **intrinsic nature** of its operations" because it has
8 the option of road transportation for aggregates. This is in contrast, for example, the
9 *Preserve Our Islands* case in which mining operations on Maury Island was indeed
10 dependent on water transportation because the operation was on an island. The Court of
11 Appeals agreed the County could issue a substantial development permit and a shoreline
12 conditional use permit for mining:
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15 Glacier's mine is located on a small island without viable large-scale ground
16 transportation options and cannot operate consistent with its designated
17 principal use without barging. The barge-loading facility is thus an integral
18 part of the principal use, and the entire facility must use the shorelines to
19 operate consistent with its County zoning. The Board correctly concluded the
20 barge-loading facility is water dependent. Substantial evidence supports the
21 Board's conclusion that Glacier's mitigation measures and the Board's
22 conditions make the facility consistent with shoreline management policies.
We affirm the Board's order requiring the County to issue Glacier's
permits.³¹⁸

23 In *Ecology v. Hama Hama* the Shoreline Hearings Board (SHB) differentiated
24 between water-dependent and water-related uses for a gravel mine in Jefferson County.³¹⁹

25 ". . . [A] water-dependent commerce or industry, to which priority should be
26 given, is one which cannot exist in any other location and is dependent on
27

28 ³¹⁷ WAC 173-26-020. "Definitions (39) 'Water-dependent use' means a use or portion of a use which cannot
29 exist in a location that is not adjacent to the water and which is dependent on the water by reason of the
30 intrinsic nature of its operations. . . (43) 'Water-related use' means a use or portion of a use which is not
31 intrinsically dependent on a waterfront location but whose economic viability is dependent upon a waterfront
32 location because: (a) The use has a functional requirement for a waterfront location such as the arrival or
shipment of materials by water or the need for large quantities of water; or (b) The use provides a necessary
service supportive of the water-dependent uses and the proximity of the use to its customers makes its
services less expensive and/or more convenient. '

³¹⁸ *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 137 P.3d 31, 2006 Wash. App. LEXIS
1280 (Wash. Ct. App. 2006).

³¹⁹ *Ecology v. Hama Hama Co.*, SHB No. 115 (Final Findings, July 21, 1976), 1976 WA ENV LEXIS 87

1 the water by reason of the intrinsic nature of its operations. A water-related
2 industry or commerce is one which is not intrinsically dependent on a
3 waterfront location but whose operation cannot occur economically without a
4 shoreline location."

5 Applying the above definition to the uses proposed by the Company leads
6 to the conclusion that they are not water-dependent. At the most, they are
7 arguably water-related.

8 In reviewing both *Preserve Our Islands* and *Ecology v. Hama Hama*, the Board finds
9 the SMP correctly classifies mining in Jefferson County as "water-related." Mining in
10 Jefferson County, however, is not completely prohibited. It is conditionally allowed in High
11 Intensity Areas and in Article 8 of the SMP, the County explains its policies and regulations
12 governing mining.³²⁰

13 **The Board finds and concludes Hood Canal has failed to meet its burden of**
14 **proof to establish the County did not meet requirements in RCW 36.70A.370(1) and (2)**
15 **and WAC 173-26-020(6) and (32).**

16 17 VII. ORDER

18 Based upon review of the Petitions for Review, the briefs and exhibits submitted by
19 the parties, the Shoreline Management Act, the Growth Management Act, prior Board
20 Orders and case law, having considered the arguments of the parties, and having
21 deliberated on the matter, the Board, concludes Petitioners failed to provide clear and
22 convincing evidence demonstrating the challenged action, as it pertains to Shorelines of
23 Statewide Significance, was inconsistent with the policy of RCW 90.58.02 and the
24 applicable guidelines in WAC 173-26. The Board also concludes that Petitioners were
25 unable to show the challenged action, as it pertains to shorelines, failed to comply with
26 policy of RCW 90.58.020 and the applicable guidelines, or the internal consistency
27 provisions of RCW 36.70A.070, 36.70A.040(4). This appeal is denied and Case No. 14-2-
28 0008c is dismissed.
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³²⁰ IR ECY00007289 (SMP Art. 4.3.A. Table 1); ECY007381-82 (SMP Art. 8.6.).

1 DATED this 16th day of March, 2015.

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3 _____
4 Nina Carter, Board Member

5
6 _____
7 William Roehl, Board Member

8
9 _____
10 Cheryl Pflug, Board Member

11 **Note: This is a final decision and order of the Growth Management Hearings Board**
12 **issued pursuant to RCW 36.70A.300.³²¹**
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31 ³²¹ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all
32 parties within ten days of mailing of the final order. WAC 242-03-830(1); WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days
as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent
upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings
Board is not authorized to provide legal advice.

Table of Appendices

Appendix A	January 9, 2015, Letter to Dennis Reynolds
Appendix B	Shorelines Diagram
Appendix C	Ecology's Marine Shorelines of Statewide Significance (SSWS), Three Delineation Schemes (handout at HOM); WA Dept. of Ecology, 2014, Jefferson County Shorelines of Statewide Significance, Figure 1; Jefferson County Shoreline Map Folio, June 2008.
Appendix D	Illustrative Exhibit #1 at HOM: Buffer Acres Plus Setback
Appendix E	Errata Sheet to OSF Petitioners Prehearing Brief on the Merits (December 16, 2014)
Appendix F	Errata to Reply Brief of Petitioners OSF, et al. (January 20, 2015)